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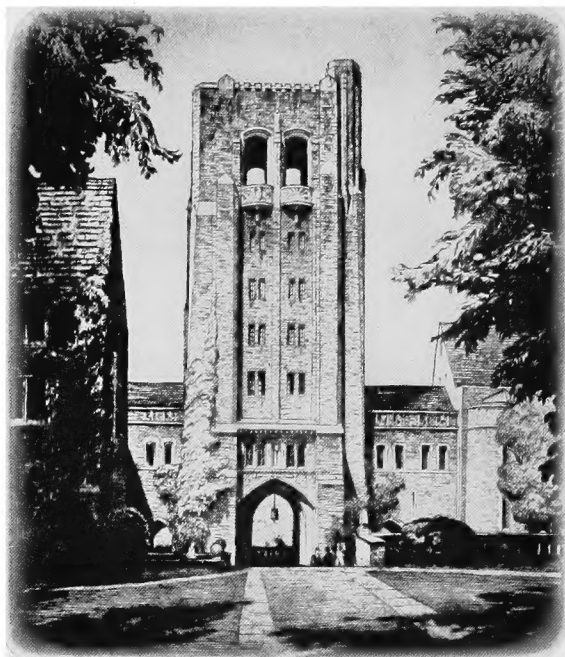
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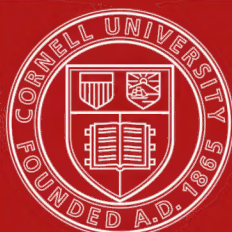
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CALLAGHAN & COMPANY
CHICAGO

CASES ON PROCEDURE
ANNOTATED

COMMON LAW
PLEADING

By **EDSON R. SUNDERLAND**

PROFESSOR OF LAW IN THE LAW DEPARTMENT OF THE
UNIVERSITY OF MICHIGAN

CHICAGO
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1914

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CASES ON PROCEDURE.

THE SERIES.

The present volume, on Common Law Pleading, is the third of a series of case-books which the editor hopes to prepare for the use of law students, covering the broad subject of Procedure. The plan contemplates separate volumes on the following special topics:—Trial Practice, Code Pleading, Common Law Pleading, Equity Pleading and Practice, Criminal Procedure, Evidence, and Appellate Practice.

These books are to be prepared as separate and independent treatments of the subjects to which they relate. Each branch of procedure has its own subject-matter and its independent problems, and no advantage would result from erasing the lines which mark its boundaries. But while this is so, it is nevertheless important to observe that an adequate conception of any one of these branches can be formed only by keeping constantly in mind the scope and function of procedure as a whole. In a very true and fundamental sense procedure is single and indivisible. Its aim is to furnish a mechanism for litigation, to supply a means and method for applying the law in the solution of legal controversies. One purpose runs through it all. Pleadings are drawn to present issues for trial; trials are had to determine issues raised by the pleadings. What the trial demands the pleadings must give. One is the counterpart of the other. Only in view of the trial are the pleadings intelligible; only by reference to the pleadings can the scope and course of the trial be determined. And as for the relation between procedure in *nisi prius* and in appellate courts, the former is moulded to meet the requirements of the latter and the latter is based strictly upon the foundation laid by the former. Thus pleading, in its various forms, trial practice, and appellate practice may be correctly viewed as component parts of a highly developed system designed to enable parties to successfully resort to courts of law for the redress of grievances. Together they furnish a complete mechanism for the administration of the law.

In the present series of case-books upon procedure it is proposed to develop the subject, so far as possible, in this broad and comprehensive way. Each branch will be treated separately, and its technical details will be fully and carefully exhibited, but at the same time it will be the definite aim to make each volume disclose its place and purpose as an integral part of an articulated system. In this way, if at all, may procedure be shown in its true character, as a logically developed and practically efficient means for accomplishing a very important end, instead of a mass of arbitrary and technical rules. No method will work well in the hands of those who lack an adequate perspective and who fail to take a comprehensive view of its scope and purpose. If the law schools are to turn out men able to meet the exacting demands of a critical and sorely-tried public, they must spare no effort to develop in their students a thorough, rational and enlightened appreciation of the true function and the basic principles of procedure. The series here proposed is an effort to supply material to meet this need.

EDSON R. SUNDERLAND.

University of Michigan.

PREFACE.

No subject is more intimately connected with the history and development of our law than common law pleading. In sharp contrast with the other great system of law, that founded by the Romans, the common law has not been the product of legislation, but of litigation. It has grown up in the atmosphere of courts of justice. Such a genesis would necessarily give it a strong procedural flavor, and would tend to emphasize remedies at the expense of rights. Procedure might therefore be expected to play a much larger part in the development of the common law than in the development of the Roman law, and such has been the fact. To understand common law rights one must understand common law remedies, for the former were developed through the latter.

Furthermore, the system of pleading developed at common law has been the foundation of all the modern codes and statutory systems. "Code Pleading," so-called, was an attempt to reform the common law system. No one can know code pleading unless he knows the system which preceded and produced it. Every statute enacted to modernize procedure is to be interpreted in the light of the practice which was intended to be superseded. Common law concepts and common law terms persistently survive every effort to abolish the common law system. And the reason that the new systems cannot eliminate the old is that they grew out of it. Ancestors cannot be abolished.

Again, no system of pleading has ever been devised that required so close an analysis of the theory and facts of a case as the common law system. It was a magnificent discipline. It called for the best efforts of the best legal minds. It was predicated upon the idea that the case was to be thoroughly sifted before trial, so that the controversy should be reduced to its lowest terms. To do this required a critical study of the case in all its bearings, and a logical and exact statement of the results of that study. Common law pleading offered no comfort to the careless lawyer.

Viewing the subject, then, in this threefold aspect, it would seem that its study should be conducted in a way to

bring out each of the features mentioned. It should be studied as an explanation of, and a commentary upon, the common law notions of rights and obligations. It should be studied as an indispensable introduction to an understanding of modern reformed systems of pleading. And it should be studied as an accurate and logical method for the analysis of legal controversies.

The purposes to be served have determined the scheme of treatment. Forms of action are not primarily instruments of pleadings but categories of rights. Whether trover or trespass lies in a given case is a question of tort law, not of pleading. Whether one may sue in special or general assumpsit is chiefly a matter of contract law. But the rights have developed through the use of the remedies, so that a study of these forms of action is quite necessary to a clear appreciation not only of the history but of the present status of the law of rights. Forms of action would therefore seem to have a proper place in a study of common law pleading, and the editor has given them a careful, though not an exhaustive, presentation.

In studying the common law system as an introduction to the modern art of pleading and at the same time as a logical discipline in the analysis of cases, a middle ground must be taken between the development of basic principles and presentation of intricate problems. The subject must be so worked out as to make it at once practically useful and intellectually stimulating. Modern pleading, as it becomes more and more simplified, departs farther and farther from the idea that its purpose is to develop and present distinct issues. It tends to emphasize the idea of information, and to turn pleadings into notices. But in so doing it tends also to relieve the practitioner from the necessity for a close and logical analysis of his case. With the standards of precision in statement constantly falling, and with liberality in the allowance of amendments constantly rising, the lawyer pays less and less attention to his pleading, and the advantage of a sifting of issues before the trial, so constantly insisted upon at the common law, tends to be lost. This growing carelessness in pleading is undoubtedly to be regretted, and can be in no way better counteracted than by careful instruction and exercise in the vigorous and effective analytical methods of the common law. The pleading problems which the common law lawyers devised and

solved were wonderful examples of legal logic, and no better material can be found for students' use than many of the cases which embody them. But technical refinements tend to cover up fundamental principles. If the student devotes too much attention to logical niceties he fails to get hold of the broader conceptions, which are permanent and which have maintained their integrity throughout all the stress and turmoil of the modern revolt against procedural precedent. A proper balance must be maintained between pleading as a method of analysis and pleading as a practical means of presenting cases for judicial decision. This aim the editor has constantly had in mind in selecting and arranging these cases.

EDSON R. SUNDERLAND.

University of Michigan,
Ann Arbor,
August, 1914.

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COMMON LAW PLEADING

CHAPTER I.

FORMS OF ACTION.

SECTION 1. THE FORMULARY SYSTEM.

The history of common-law procedure practically begins with the Norman Conquest of England in 1066. Prior to that time legal institutes were crude and ill defined. In the great days of the Roman Law, when continental Europe was coming under its domination and the work of Justinian had given it a breadth and scope and precision which succeeding centuries have done comparatively little to improve, England remained submerged in her insular ignorance. Ancient tribal customs for the most part satisfied the needs of her rude inhabitants who knew and cared little for the refinements of foreign civilization. They had no genius for legal theory or judicial administration, and paid no more attention to lawmaking or law enforcement than the simple demands of primitive, pastoral folk rendered absolutely necessary. England was almost entirely unorganized, and justice was administered in a very imperfect way through local courts.

With the coming of the Norman kings the whole situation underwent an almost revolutionary change. A strongly centralized government was at once established, which undertook the task of bringing the scattered elements of English society under the direct control of the king. The methods used were civil rather than military. With their keen genius for government the Norman kings understood that the surest way to establish themselves was to guarantee to the people adequate protection to person and property. The private and feudal local courts had been weak. Lawlessness went unpunished. Procedure was slow and its formalism made justice precarious and inadequate. A vig-

orous judicial administration was the political need of the time, and the new rulers of England undertook to provide it.

"The great instrument for the reconstruction of the judicial administration was the king's writ."¹ This writ was executive, not judicial. It did not issue from a court, but was in effect a royal authorization to the king's court to adjudicate the controversy described therein. Without the writ the court had no jurisdiction of the subject matter of the suit.

A characteristic feature of the writ was its description of the nature of the controversy. Every writ was directed to the facts of the case in hand. The suitor stated to the king's secretary, the chancellor, the details of his grievance, and the chancellor prepared a writ in the king's name commanding the king's officer, the sheriff, to summon the accused party before the king's court to show why he had done the acts complained of. The writ was substantially an executive order to show cause. Unless the aggrieved party could obtain a writ he could prosecute no suit in the king's court; and when he did obtain a writ it was an executive sanction to try just the case outlined therein and no other.

The nature and form of these original writs is well illustrated by the numerous examples given by Glanville in his *Treatise on the Laws and Customs of England*.² A few instances will make clear how narrowly the writ circumscribed the scope of the inquiry which was to come before the court.

"When anyone," says Glanville, "complains to the court, concerning a debt that is due to him, and be desirous of drawing the suit to the King's Court, he shall have the following writ, for making the first summons:

"The King to the Sheriff, Health. Command N., that justly and without delay, he render to R., one hundred marks which he owes him, as he says, and of which he complains that he has unjustly deforced him. And, unless he does so, summon him, by good Summoners, that he be before me or my Justices at Westminster in fifteen days from

1. 3 Street on Foundations of Legal Liability, 28.

2. Translated into English by John Beames, Esq., of Lincoln's Inn, and published by John Byrne & Co., Washington, D. C. Glanville was chief justiciar under Henry the Second.

Pentecost, to shew wherefore he has not done it. And have there the Summoners and this writ. Witness, etc.' "

Suppose, however, that the case is one where the debt is secured by the giving of pledges. Then, Glanville tells us, "if the principal Debtor shall be so much reduced as to be incapable of discharging it, recourse must be had to the Pledges; and they shall be summoned by the following Writ:

" 'The King to the Sheriff, Health. Command N., that justly and without delay, he acquit R. of the Hundred Marks against N., for which he has become his surety, as he says, and of which he complains he has not acquitted him. And, unless he does so, summon him, by good Summoners, etc.' "

One of the most popular writs was that known as the Writ of Novel Disseisin, which was brought by the disseisee of land against the disseisor. It ran as follows:

" 'The King to the Sheriff, Health. N. complains to me, that R. has, unjustly and without a Judgment, disseised him of his free Tenement, in such a Vill, since my last Voyage to Normandy; and, therefore, I command you, that if the aforesaid N. should make you secure of prosecuting his claim, then, you cause the Tenement to be resealed, with the Chattels taken on it, and that you cause him with his Chattels to be in peace, until Pentecost; and, in the meantime, you cause twelve free and lawful men of the neighborhood to view the Land, and their names to be imbreviated; and summon them, by good Summoners, that they be then before me, or my justices, prepared to make the Recognition; and put, by gage and safe pledges, the aforesaid R., or his Bailiff, if he be not to be found, that he be then there to hear such Recognition, and have there the Summoners and this Writ. Witness, etc.' "

But if one die seised of land in fee, and a stranger forestalls the heir and acquires seisin, the Writ of Novel Disseisin, as above set out, obviously does not apply to the case, and another writ, fashioned to the different facts, called a Writ of Mort d'Ancestor, must be used by the heir to recover the land. Again, this writ was so drawn as to apply only to the son, daughter, brother, sister, nephew or niece of the ancestor, and if the heir did not sustain one of these relations he could not make use of the Writ of Mort d'Ancestor, but was required to obtain a Writ of

Aiel, Besail, Tresaiel or Cosinage, depending upon the remoteness of his relationship.³

It will be seen from these illustrations that every writ was based upon a particular set of facts, and where the facts of two cases differed even in such details as we should deem wholly immaterial, the cases frequently had to be prosecuted by different writs. Every writ which was drawn up and issued in behalf of a suitor became a model to be used in other identical cases. These precedents grew in number until the Register of Writs became a volume of "some seven hundred large pages, whereas we started in Henry III's days with some fifty or sixty writs capable of filling some ten or twelve pages."⁴

The development of writs measured the development of rights, for there was no right without a remedy, and no adequate remedy was available save by the king's writ. At first the suitor obtained his writ through the apparent justice of his case, but as the body of precedents grew, the tendency became more and more marked to keep within the scope of the actions previously authorized. Accordingly if one deemed himself aggrieved by the action of another, and desired legal redress, his course was to examine the register of writs for a precedent applicable to his case. If he found one, it was at once issued to him on payment of the required fee. If none fitted his case, he was without a remedy, unless the chancellor was willing to make a new one for him.

Doubtless this power of devising new writs, and thereby creating rights of action, was one capable of great abuse in the hands of an unscrupulous king or chancellor, but as long as the catalogue of existing writs fell substantially short of meeting the current demands of the people, the advantages derived from the exercise of the power outweighed the injuries which flowed from its occasional arbitrary misuse. The time came, however, when it was thought necessary to check the power of creating new writs, and in 1258 the Provisions of Oxford prohibited the issuance of writs other than those "of course," which were the

3. 2 Pollock & Maitland, *History of English Law*, 57.

4. 2 Maitland, *Selected Papers*, 172, on *The History of the Register of Original Writs*. This paper was published in 3 *Harvard Law Review*, 169, Oct. 15, 1889, and is reprinted in 2 *Select Essays in Anglo-American Legal History*, pp. 549-596.

writs already in the register, without the approval of executive council as well as of the king.⁵ These provisions were soon swept away by the tide of political events, but the reform which they attempted to make in the matter of writs seemed to persist by common consent, until the writ system became so rigid and unresponsive to the growing needs of the time that Parliament found it necessary in 1285 to interfere and to expressly authorize the issuance of new writs out of the chancery. This was the famous statute of Westminster the Second, which provided in chapter 24, that, "Whenever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the clerks of the chancery shall agree in making the writ; or, the plaintiffs may adjourn it until the next parliament, and let the cases be written in which they cannot agree, and let them refer themselves until the next parliament, by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants."

It will be seen that there were as many kinds of actions at law as there were writs, and no more. All actions which could be prosecuted under the same writ were of the same *form*; action requiring different writs were of different *form*. The form of action was therefore of substantial importance. Unless the facts of a case brought it under one of the recognized forms there was no right of action, for there was no writ. The writ created the right, and *conformity* to some writ was the test of a *prima facie* right to sue. The study of law was the study of writs. "*De Natura Brevium*, Of the Nature of Writs—such is the title of more than one well-known textbook of our mediaeval law. Legal Remedies, Legal Procedure, these are the all-important topics for the student. These being mastered, a knowledge of substantive law will come of itself. Not the nature of rights, but the nature of writs must be his theme. The scheme of 'original writs' is the very skeleton of the *Corpus juris*." ⁶

5. Stubbs' *Select Charters*, 389.

6. Maitland: *The History of the Register of Original Writs*, 2 Collected Papers, 110.

The authority conferred by the Statute of Westminster II was not to frame entirely new writs, but new writs analogous to those already in the register. By implication the issuance of writs in entirely new cases was prohibited. From the standpoint of the common law this was unfortunate. It offered an opportunity for a measure of growth, but it made no adequate provision for the enormous expansion which society was subsequently to force upon the remedial law. Deprived of a remedy by the rigidity of the register of writs, the litigant had no recourse but to petition the king, and the king referred him to the "keeper of his conscience," the chancellor. Here no arbitrary catalogue of rights restricted the power of the chancellor to do justice, and a new "chancery jurisdiction" grew up, as a supplement to the circumscribed jurisdiction of the law courts. The subsequent development of the law continued along restricted lines. Its broad boundaries were unalterably fixed, but within those limits there was much to be done. It was inevitable that as the law developed into a body of general rules, wherein immaterial variations in facts were lost in the identity of principles, the vast and complicated system of writs should tend to become simplified. Those writs which were based on fundamental and elementary states of fact would tend to gain in popularity, and would gradually be construed to embrace the lesser varieties of the same class. In other words, with the generalizing of the law came a corresponding generalizing of writs, until the great catalogue of the Register of Writs became largely obsolete. All but a few were unused and forgotten. But these few which survived not only retained in themselves all the vitality of the entire register, but lent themselves to broader uses. Accordingly, in the final development of the common-law writs, there were less than a dozen currently used forms of action, each founded upon its appropriate form of writ, which collectively were deemed to embrace all causes of action of which common-law courts took cognizance.

These residuary forms of action have been classified into real, personal and mixed actions, and personal actions into actions *ex delicto* and *ex contractu*. There seems to be no strictly real action, for Ejectment, a mixed action, has supplanted the long list of real actions which filled the major portion of the register of writs. Personal actions *ex de-*

licto are Trespass, Trespass on the Case, Trover, Replevin and Detinue, and those *ex contractu* are Debt, Covenant, Assumpsit and Detinue. The nature and scope of each of these forms of action will form the subject matter of the remaining sections in this chapter.

SECTION 2. TRESPASS.¹

LOUBZ v. HAFNER.

Supreme Court of North Carolina. 1827.

1 Devereux Law, 185.

The Plaintiff declared in trespass *vi et armis*, and on the trial before STRANGE, J., offered to prove that as he was passing with his wagon on the highway, the Defendants

7. FORMS OF DECLARATION.

Trespass to Person (Assault or Assault and Battery).

For that the said C D, on the — day of —, in the year of our Lord —, with force and arms, made an assault upon the said A B, to wit, at, etc., and then and there beat, bruised and ill-treated him the said A B, insomuch that he the said A B by means of the premises, then and there became sick, * * * And other wrongs to the said A B then and there did, against the peace of our said lord the king, and to the damage of the said A B of — l. and therefore he brings his suit, etc.

Trespass to Personalty (De bonis asportatis).

For that the said C D, on the — day of —, A. D. —, with force and arms, to wit, at the parish of —, aforesaid, in the county of —, aforesaid, seized, took and carried away certain goods and chattels, to wit, a certain wagon, of the said A B, of great value, to wit, of the value of — l. of the lawful money of Great Britain, there then found and being, and converted and disposed of the same to his own use * * * And other wrongs to the said A B then and there did against the peace of our said lord the king, and to the damage of the said A B, of — l., and therefore he brings his suit, etc.

Trespass to Real Property (Quare clausum fregit).

For that the said C D, on, etc., with force and arms, broke and entered a certain dwelling house of the said A B, situate and being in the parish of —, in the county of —, and then and there ejected, expelled, put out and removed the said A B and his family from the possession, use, occupation and enjoyment of the said dwelling house, and kept and continued them so ejected, expelled, put out and removed, for a long space of time, to wit, from thence hitherto. Whereby the said A B for and during all that time lost, and was deprived of the use and benefit of his said dwelling house, to wit, at, etc., aforesaid. And other wrongs to the said A B then and there did against the peace of our said lord the king, and to the damage of the said A B, of — l., and therefore he brings his suit, etc. See 2 Chitty on Pleadings, pp. 367-394.

came into the road (but not so as to interrupt the Plaintiff's progress) and commenced beating a drum for the purpose of frightening his horses, whereupon they took fright, ran away, and damaged the Plaintiff's wagon, etc., but the presiding Judge being of opinion that case, and not trespass, was the proper remedy, the Defendants had a verdict. A new trial was afterwards moved and denied, and the Plaintiff appealed.

TAYLOR, C. J.: All the authorities concur in the position, that whenever the injury is committed by the immediate act complained of, the action must be trespass; in other words, "if the injurious act be the immediate result of the force originally applied by the Defendant, it is the subject of an action of trespass *vi et armis*, by all the cases ancient and modern, and that it is immaterial whether the injury be wilful or not." Several cases are put to illustrate this rule, as when one shooting at a mark with a bow and arrow, and having no unlawful purpose in view, wounded a man, it was held that trespass was the proper action. So where a person is lawfully exercising himself in arms, and happen to wound another, the same action must be brought (Hob. 134). In actions of trespass, the distinction has not turned either on the lawfulness of the act from whence the injury happened, or the design of the party doing it, to commit the injury; but on the difference between immediate injuries or consequential ones. For if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass (3 East, 600).

It is impossible to doubt from the statement in this case, that the action is properly brought according to all the decisions. For if wilfulness were a necessary ingredient in the case, it exists here, since the Defendant beat the drum for the purpose of frightening the Plaintiff's horses. It is much stronger than the case of *Scott v. Shepherd* (2 Bl. R. 892), for here the act was immediately injurious, without any intermediate agency. If in the case of *Scott v. Shepherd*, the injury had been done to the person upon whom the squib first alighted, it would have resembled the case before us, and then there would have been no grounds for the dissenting opinion of Mr. Justice BLACKSTONE, who thought that the first act was complete, when the squib lay on the stall where it first fell, and that the injury done to

the Plaintiff after the squib had received two new directions, was the consequence of, and not done immediately by the first act of the Defendant.

The nature of the act done in this case, the time and place where it was done, a wagon and team passing the public road, rendered it probable that injury would be the immediate consequence, and would render the Defendant liable in the action, though he had no views to the consequences. For though the bad intention must be alleged and proved in a charge of felony, it is not necessary to be considered in this action. "Where a man shoots with a bow at a mark, and kills a man, it is not felony, and it should be construed, that he had no intent to kill him, but when he wounds a man although that it be against his will, he shall be said to be a trespasser" (3 Wils. 408). If the injury done be not inevitable, the person who doth it, or is the immediate cause thereof, even by accident, misfortune, and against his will, is answerable in this action of trespass *vi et armis*. (1 Strange 596- Sir. T. Jones 205- Sir T. Raym. 422.) For these reasons, I am of opinion, that upon every ground of law and convenience, as well as the most manifest justice in the particular case, the action was well brought, and the Plaintiff on the proof offered, should have had a verdict.

PER CURIAM. Judgment reversed, and new trial awarded.

JAMES v. CALDWELL.

Supreme Court of North Carolina. 1834.

7 Yerger, 38.

Mr. Chief Justice CATRON delivered the opinion of the court.

The declaration states that James, with force and arms, drove, chased, and set his dogs upon the mare of Caldwell, and thereby caused her to run upon and against a stake of wood with great force and violence, so that said stake of wood penetrated the side of the mare, of which she afterwards died.

It is moved to arrest the judgment because the facts set forth will not support an action of trespass *vi et armis*; and it is insisted, for James, that the injury of the mare running on the stake was consequential, and case could only be supported. The dogs were the instruments of assault as much as a stone thrown from the hand would have been. The violently chasing the mare was in itself a trespass, if unlawful for the defendant to do so; but the declaration does not state this; yet the chasing of the nag forced her on the stake, and the injury was immediate, and proceeded from the act of the defendant. The whole was but one act, as in *Scott v. Shepherd*, for throwing a squib. 2 Wilson, 403. In that case one was cited much in point to the present. It is this: "If a man be riding on the way, and another man striketh his horse, by which the rider falleth and is hurt, he which is cast off his horse shall have trespass against the other. The stroke given is to the horse, and not to the rider, but he is instantly hurt by the fall, in consequence of the act of striking the horse." This case rests on the ground that the defendant in committing the trespass, used an agent—the horse ridden; but the whole was one act, proceeding from the defendant, and immediate in point of time. We, therefore, think this first ground against James, the plaintiff in error.

* * * * *

WILSON v. SMITH.

Supreme Court of New York. 1833.

10 Wendell, 324.

The plaintiff declared in case, setting forth in his declaration an act of the legislature, authorizing him to erect a dam across the Genesee river in a certain specified manner, at a certain place, and that he erected the dam according to the provisions of the act; that he was in the possession and occupancy of a sawmill supplied with water from such dam, and that the defendants, well knowing the premises, with an intent to injure and aggrieve him, on, etc., at, etc., with axes and others tools and implements, cut and re-

moved a part of the timbers and other materials composing the dam, so that by the action of the water upon the breach made in the dam, a great part thereof was wholly displaced and carried away, by means whereof the plaintiff was deprived of the use of his mill for a long time, that is to say, from, etc., hitherto, and of the gains and profits which would have accrued to him thereby, and was put to great expense in repairing the dam, and was otherwise greatly injured, etc. The defendants pleaded the general issue. The plaintiff proved the erection of the dam, and that he owned a sawmill supplied with water by means thereof; that the defendants cut away some of the timbers composing the dam, made a breach in it, and that by means of the breach, the operation of his mill was suspended for several months; and was proceeding to show the amount of his damages, when the defendants' counsel interposed an objection to the form of the action, insisting that the plaintiff should have brought trespass, and not case, and on that ground moved that the plaintiff be nonsuited. The counsel for the plaintiff contended that the action was for the disturbance of a franchise, and that for such an injury the only remedy was case; but whether so or not, the objection to the form of action could not be taken at the trial. The judge nonsuited the plaintiff, who now moved for a new trial.

By the Court, SUTHERLAND, J.: The action in this case should have been trespass, and not trespass on the case. The ground on which the form of the action was endeavored to be maintained at the trial, and also upon the argument at bar, was, that the right to erect the dam, for an injury to which the action was brought, was a franchise, an incorporeal hereditament; and that for an injury to property, or right of that description, trespass will not lie. The principle here adverted to, does not apply to the case. The right to erect the dam is a franchise; it is conferred by the legislature, the sovereign power; it is an incorporeal right; but the dam itself is not a franchise, nor is it incorporeal. The right to keep a ferry, or to erect a bridge, or to navigate a particular river or lake by steam, may be a franchise; but the bridge itself, or the boats and machinery employed in the ferry, or the navigation of the river, may, notwithstanding, be the subjects of trespass. Suppose the outrage which is alleged in this case to have been committed on the plaintiff's dam, had been committed upon

the Cayuga Bridge, or the steam boat navigating that lake, or the ferry boats between Albany and Greenbush, or Albany and Troy; can there be a doubt that the individuals who perpetrated the act would be liable as trespassers to the individuals or companies to whom the bridge or boats belonged? So far as the incorporeal right is invaded, the redress is by an action on the case. But when visible, tangible, corporeal property is injured, if the injury be direct, immediate and wilful, trespass is the proper form of action, although that property may be connected with, or be the means by which an incorporeal right is enjoyed.

I did not understand the counsel for the plaintiff to deny, that independently of this particular feature of the case, the action might and should have been trespass. The evidence certainly shows a very clear case of direct and immediate injury, from the wilful and intentional act of the defendants; and in such a case I consider it well settled that the action must be trespass. This subject was very elaborately considered by this court in *Percival v. Hickey*, 18 Johns. R. 257, where all the leading cases were referred to and analyzed. The case of *Leame v. Bray*, 3 East, 593, was considered as establishing the true doctrine; and there, as in *Percival v. Hickey*, it was held, that where the injury is the immediate and direct result of the force originally applied or directed by the defendant, trespass is the proper remedy, whether the injury was wilful or not. In both of those cases it was the result of negligence only, and yet the actions were sustained. *Scott v. Shepherd*, 3 Will. 411, 2 Bl. R. 892, S. C. *Ogle v. Barnes*, 8 Term R. 198. 6 id. 128. 5 id. 649. 1 Strange, 596, 636. Hob. 134. Peake's N. P. 107. 1 Term R. 569. 1 Camp. 497. 5 Bos. & Pull. 117, 446. 1 ib. 472. Mr. Chitty states the rule correctly, as I apprehend, 1 Chitty's Pl. 127; he says, in case of injuries arising from driving carriages or navigating ships, etc., if the injury were immediate, and be stated in the declaration to have been wilfully committed, or appear to have been so on the trial, the remedy must be trespass; but if the injury was attributable to negligence, though it were immediate, the party injured has an election either to treat the negligence of the defendant as the cause of action, and to declare in case or to consider the the act itself as the injury, and to declare in trespass.

The cases already referred to support this distinction. It was also taken in this court in *Blin v. Campbell*, 14 Johns. R. 432, and was recognized by Judge SPENCER, in delivering the opinion of the court, in *Percival v. Hickey*. In this case the injury was direct and immediate, and the evidence showed it to have been wilfully committed, and according to the authorities referred to, trespass only would lie in such a case. In trespass all the consequential damages may be recovered under a *per quod*, so that there is no necessity for departing from the appropriate form of action. The only remaining question is, whether this objection to the form of the action could be taken upon the trial. *Leame v. Bray*, 3 East, 593, is a direct authority for the position that the objection may be taken at the trial; in that case, as in this, it was taken at the trial, and the plaintiff was nonsuited on that ground alone, and on the motion to set aside the nonsuit, no objection was started, that it was not ground of nonsuit if the action was in fact misconceived. The real objection is, that the evidence does not sustain the action, and that is in all cases ground of nonsuit. In *Ogle v. Barnes*, 8 Term R. 191, 2, which was an action on the case, LAWRENCE, J., says, if it had appeared in evidence in this case that the defendants had wilfully done the act, the plaintiff must have been nonsuited. It is in truth a variance between the declaration and the proof.

Motion for a new trial denied.⁸

8. In *Osborne v. Butcher* (1857) 26 N. J. L. 308, plaintiff sued in trespass because "~~the defendant had shut up, blocked up, obstructed, and rendered impassable a certain byroad, then used by the plaintiff.~~" The court said: "The gravamen is the obstruction of a byroad, and thereby depriving the plaintiff of its use. The obstructing and blocking up of the road may have been direct, immediate, wilful and forcible, but that was not to, or upon the land of the plaintiff or to his possession; it was not direct and immediate as to him. The injury to him was the depriving him of the use of the byroad by reason of such obstruction. It was indirect and consequential, and therefore the subject of an action on the case, and not of trespass."

THE ST. LOUIS, VANDALIA AND TERRE HAUTE
RAILROAD COMPANY v. THE TOWN OF
SUMMIT.

Appellate Court of Illinois, Fourth District. 1878.

3 Illinois Appellate, 155.

BAKER, J. This is an action of trespass *quare clausum fregit*, prosecuted by the appellee against the appellant. The locus in quo is that part of the National or Cumberland road that is located in the township of Summit, in Effingham county.

The case was submitted to a jury at the September term, 1877, of the Effingham Circuit Court, and a verdict was returned into court finding the appellant guilty and assessing the damages at \$2,000.

* * * * *

The first question that arises upon this record is as to whether the plaintiff below had such possession of the *locus in quo* as would enable it to maintain trespass.

The gist of the action of trespass, *quare clausum fregit*, is the injury to the possession, and the general rule is that without actual possession trespass cannot be supported. The English doctrine, is that as to real property, there is no such constructive possession as will enable the plaintiff to support this action. 1 Chit. Pl. 176, 177, and notes.⁹

With us the rule is relaxed, and when the plaintiff is the owner and the lands are unoccupied, or there is no adverse possession, trespass can be maintained. *Dean v. Comstock*, 32 Ill. 173; *Smith et al. v. Wunderlick et al.*, 70 Ill. 426.¹⁰

9. "There is a material distinction between personal and real property, as to the right of the owner: In the first case we have seen that the general property draws to it the possession, sufficient to enable the owner to support the trespass, though he has never been in possession; but in the case of land and other real property, there is no such *constructive possession*, and unless the plaintiff had the *actual possession* at the time when the injury was committed, he cannot support this action." 1 Chitty on Pleading (Ed. of 1809) 176.

10. The rule was tersely stated in *Smith v. Wilson* (1834), 1 Dev. & Battle L. (N. C.) 40, as follows: "The plaintiff having failed to show that he had any title to the land, when the supposed trespass was committed, therefore, failed to show a constructive possession; then the court was certainly right, in stating to the plaintiff, that he could not proceed without showing an *actual possession* of the *locus in quo* the trespass was alleged to have been committed."

The title to the National road being in the State, and not in the town of Summit, it is clear that there can be no constructive possession in the town, upon the principle that the possession follows the title when there is no adverse possession. The town, through its commissioner of highways, had merely the care and superintendence of the road, and the duty imposed upon it of keeping it in repair, etc.

The only evidence in the case tending in the least to show actual possession in the plaintiff, was the testimony of several witnesses, who stated that the National road through Summit township had been worked by the road labor in that township, as other highways were worked. We do not understand that this was such possession as would sustain the action of trespass *quare clausum fregit*; in fact, it was a mere performance of the duty imposed by statute upon the town authorities to keep the highways in repair.

* * *

The judgment of the court below is reversed and the cause remanded.

*Reversed and remanded.*¹¹

11. Possession of the surface and subsoil may be in different persons, as where the mayor and aldermen of the borough of Derby had exclusive possession of the surface of a close for the purpose of pasturage during the season, but it was held that the plaintiffs, who held the fee, retained possession of the subsoil, so that they could maintain trespass *quare clausum fregit* for cutting into and digging holes in the subsoil. *Cox v. Glue* (1848), 5 C. B. 533.

SMITH v. WUNDERLICH.

Supreme Court of Illinois. 1873.

70 Illinois, 426.

Mr. Justice McALLISTER delivered the opinion of the Court:

This was trespass *quare clausum fregit*, by appellees against appellants. The cause of action declared on, was an ouster of plaintiffs, by defendants, from a certain shop on Madison street, Chicago, wherein plaintiffs, as partners, then were, and for some time previously had been, carrying on the business of shoemakers. The ouster was

set out as occurring December 11, 1871, with a *continuando* to time of commencement of suit. The suit was brought January 27, 1872. The plaintiffs, on the trial, gave evidence tending to show that they held the premises under a verbal lease from Dunne, one of the defendants, and that their term extended until May 1st, 1872; also gave evidence, against the defendants' objections of the difference between the actual rental value of the premises, and what they were to pay as rent, down to the first day of May, 1872; also gave evidence tending to show prospective profits in their business to that time.

By the first instruction given for plaintiffs, the court directed the jury that, if they found, from the evidence, that plaintiffs had a verbal lease of the premises to the first day of May, 1872, and were wrongfully ousted therefrom by the acts of the defendants, then the latter were liable, and the damages should be; first, the difference between the rental value of the premises, as appears from the evidence, from the time they were so ousted, and the amount plaintiffs were to pay as rent until May 1st, 1872; second, any loss sustained by them in their business, shown, by the evidence, as the necessary consequence of being deprived of the premises, after the time when the jury shall believe, from the evidence, the plaintiffs were ousted.

To the giving of this instruction defendants excepted, and now assign it for error.

There is no evidence tending to show that, after the ouster was consummated, they made any lawful re-entry, or brought any action of forcible entry and detainer, to recover possession; but, on the contrary, they brought this action to recover for the ouster, before their term expired. * * *

* * * * *

To maintain trespass to real property, the plaintiff must have the actual possession, by himself or his servant, at the time when the injury was committed. The only exception to this rule is, where the plaintiff is owner, and the lands are unoccupied, or there is no adverse possession. 1 Chit. Pl. 177, and cases in notes; Sedg. on Dam. 134; *Dean v. Comstock*, 32 Ill. 173. The gist of the action is, the injury to the possession.

It follows, from the above rule, that if the trespass amount to an ouster of the plaintiff, he can recover dam-

ages only for the trespass itself, or first entry; for though every subsequent wrongful act is a continuance of the trespass, yet, to enable the plaintiff to recover damages for these acts, there must be a re-entry. 1 Chit. Pl. 177; Sedgwick on Dam. 135; Addison on Torts, 304. "A disseizee may have trespass against the disseizor, for the disseizin itself, because he was then in possession; but not for an injury after the disseizin, until he hath gained possession by re-entry, and then he may support this action for an intermediate damage." Taylor on Landlord and T., sec. 783. See, also, Blac. Com., book 3, p. 210.

In *Monchton v. Pashley*, 2 Ld. Raym. 974, s. c. 2 Salk. 638, Lord Holt said: "As to the case of an entry with ouster, it may be set forth specially in the count or not, with a *continuando* or *diversis diebus et vicibus*, between such a day and such a day; but then you must prove that the plaintiff re-entered before the action brought, or else you can not assign the mesne trespass; for, by the ouster, the defendant had got the plaintiff's possession, and he can not be a trespasser to the plaintiff; but when the plaintiff re-enters, the possession is in him *ab initio*, and he shall have the mesne profits."

In *Case v. Shepherd*, 2 Johns. Cases, 27, the court say: "The only question, therefore, is, as to the extent of the damages to be recovered, or whether the defendant is to be made responsible for the consequential damages of the ouster. In this case, the trespass is laid with a *continuando*; but the distinction as to the amount of damages to be recovered in this case is this: After an ouster, you can only recover for the simple trespass, or the first entry; for though, when there is an ouster, every subsequent act is a continuance of the trespass, yet, in order to entitle the plaintiff to recover damages for the subsequent acts, there must be a re-entry; but, after a re-entry, he may lay his action with a *continuando*, and recover mesne profits, as well as damage for the ouster. 1 Ld. Ryam. 692; 6 Slak. 639; 2 Ld. Raym. 974; 1 Leon. 302, 319; 13 Coke, 600; *Menville's Case*, 3 Blac. Com. 210; Co. Litt. 257. The present suit was commenced before any re-entry by the plaintiff. He is, therefore, entitled to recover damages for the first entry only, or single trespass, and not for the crops." See, also, *Holmes v. Seely*, 19 Wend. 507; *Rowland v. Row-Sunderland*—C. L. P. 2

land, 8 (Ham.) Ohio R.; *Shields v. Henderson*, 1 Lit. (Ky.). R. 239.

In *Allen v. Thayer*, 17 Mass. R. 300, the court say: "Now, a disseizee can not maintain trespass for the wrong done after the disseizin, and before a re-entry; for the freehold is in the disseizor all the time after the disseizin, excepting in cases where the estate of the disseizee shall have determined so that he could not re-enter; as, where he was tenant for years, and his term expired, or was tenant *per auter vie*, and the *cestui qui vie* died."

In the case at bar, the plaintiff's term had not expired, and did not expire until several months after this suit was brought. There was ample time for them to have brought an action of forcible entry and detainer, and thus have regained possession. That done, the law, by a kind of *jus postliminii*, or right of reprisal, would regard the possession as having been all along in them (3 Blac. Com. 210); and then, after the expiration of their term, bringing this suit, they would be entitled to recover, as mesne profits, the value of their lease or term; for, as a general rule, the annual value of the land is the measure of mesne profits. Adams on Ejec. 391; Sedg. on Dam. 124. The theory on which such recovery could be had would be, that the trespass was continued to the end of the term.

The plaintiff not having re-entered, and their lease not expiring until many months after the ouster, they were not, upon the principle of the authorities cited, entitled to recover mesne profits from the ouster to the end of their term, but must be confined to the ouster itself, or the single trespass. They, of course, are entitled to recover for all the necessary and natural consequences of that act, in view of all the circumstances belonging to it, including such loss as they sustained by breaking up their business, if it was thereby broken up, and if circumstances of aggravation are shown, which render it impossible to apply any fixed rule of law, the jury have the power to give exemplary damages, to be graduated with reference to the motives which actuated the defendants, and the manner in which the act complained of was committed. *Sherman v. Dutch*, 16 Ill. 283.

* * * * *

The judgment of the court below will be reversed and the cause remanded.

Judgment reversed.

HOYT v. GELSTON.

*Supreme Court of New York. 1816.**13 Johnson, 141.*

[This was an action of trespass brought against David Gelston, collector of the port of New York, and another, for the seizure of the vessel "American Eagle." A libel was filed against her on the ground that she had been fitted out to commit hostilities upon the subjects of a foreign State with which the United States was then at peace, but upon a trial in the District Court the libel was dismissed and the court ordered restitution of the vessel to the plaintiff, her owner. The plaintiff then brought this action for damages.]¹²

SPENCER, J., delivered the opinion of the Court. The bill of exceptions taken at the trial, presents two points for the consideration of the Court:

1. Was there sufficient evidence of property in the plaintiff? * * *

With respect to the first point, the bill of exceptions states, that the plaintiff gave in evidence, that, at the time of the seizure of the ship American Eagle, by the defendants, she was in the actual, full and peaceable possession of the plaintiff; and that, on the acquittal of the vessel in the District Court, it was decreed that she should be restored to the plaintiff, the claimant of the vessel in that Court; and the plaintiff then gave in evidence the proceedings in the District Court, by which the above facts fully appeared. In this stage of the cause, and after the plaintiff had proved the seizure of the ship by the defendants, and her value, a motion was made by the defendants' counsel, that the plaintiff should be non-suited, on the ground that there was not sufficient evidence to entitle the plaintiff to a verdict, no right or title having been shown in the plaintiff to the ship. We are of opinion that the motion for a nonsuit was correctly overruled. It is a general and undeniable principle that possession is a sufficient title to the plaintiff in an action of trespass, *vi et armis*, against

12. Condensed statement of facts by the editor.

a wrong doer. (1 East's Rep. 244. 3 Burr. 1563. Willes's Rep. 221. Esp. Dig. 403. Gould's edit. part 2. 289.) The finder of an article may maintain trespass against any person but the real owner; and a person having an illegal possession may support this action against any person other than the true owner. (1 Chitty's Pl. 168. 2 Saund. 47. d.) If these principles are applied to this case, it will appear, at once, that the evidence of the plaintiff's right to the ship was very ample.

* * * * *

For these reasons we are of opinion that the motion for a new trial must be refused, and that the plaintiff have judgment on the verdict.

Judgment for the plaintiff.

ROCKER v. PERKINS.

*Supreme Court of the District of Columbia. 1888.
6 Mackey, 379.*

This was an action of trespass. The declaration alleged that the defendants with force and arms, etc., "wrongfully seized a certain colt of the plaintiff of the value of \$150, and then and there carried away the same and converted and disposed of the same to their own use," to the damage of the plaintiff \$250.

The defendants, Perkins and West, pleaded not guilty.

* * * * *

On cross-examination the plaintiff was asked whether he had not sold, prior to the 29th of November, to one Theodore Plitt, certain of his goods and chattels and received a consideration therefor. He replied that he had executed such a bill of sale, but that it was merely as security for a debt of \$500 due Mr. Plitt. That possession of the property had not been transferred to Mr. Plitt, but that he had been permitted by said Plitt to retain said goods and chattels, including the colt in question, with the understanding that if he should fail to pay said debt he (Plitt) might take possession of the said colt and the other goods and chattels mentioned in the bill of sale.

* * * * *

Mr. Chief Justice BINGHAM delivered the opinion of the Court:

The only question before us is whether or not in the case of a sale such as was shown to have been made here, the plaintiff parted with his property in the colt in such a manner as that the allegation in the declaration that the colt was the colt of the plaintiff is supported by the evidence. In other words, if the plaintiff's possession was by virtue of his arrangement with Plitt, that he should keep the colt until the maturity of the debt, when, if he failed to pay, Plitt was to take possession, were these facts sufficient to support the averment of ownership in the declaration? The position of the defense is that if the plaintiff had only a special ownership of the colt, such as the right of possession under the agreement with Plitt, then in order to recover he must allege such ownership in his declaration, and prove it upon the trial. We are satisfied that there is no authority sustaining that view of the law. It is a well settled rule of pleading that it is sufficient in this class of actions simply to allege ownership in the plaintiff, and then any proof of ownership which will support the action of trespass will be sufficient under such an allegation to entitle him to recover. The mere right of possession is sufficient to maintain the action against every one but the owner, and the allegation that the plaintiff is the owner is well made out by merely proving his right of possession.¹³

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13. A subsequent sale and delivery of property injured by a trespass has no effect in depriving the party who had possession at the time of the trespass, of his right to sue. *Boynton v. Willard* (1830), 10 Pick. (Mass.) 166.

DICKINSON v. MANKIN.

Supreme Court of Appeals of West Virginia. 1906.

61 West Virginia, 429.

BRANNON, J.: John G. Dickinson brought an action of trespass *quare clausum fregit* against Crocket Mankin and P. S. Burkholder to recover damages for entering upon a

tract of land claimed by Dickinson and cutting timber thereon. The defendants pleaded two pleas, one not guilty, the other *liberum tenementum*. A trial before a jury was had resulting in a verdict for the defendants, on which judgment was rendered for them, and Dickinson brings the case to this Court.

The defendants challenge the jurisdiction of this Court to entertain the writ of error. * * *

But can the plaintiff sustain his writ of error on the ground that it is a controversy concerning title or boundaries of land? The case of *Greathouse v. Sapp*, 26 W. Va. 87, is decisive to show that such action of trespass does not involve title or boundaries of land so as to give a writ of error under that clause of the constitution granting a writ of error in suits involving title or boundary of land, though the record show that title and boundary were in fact in question in it. But in that case the only plea was not guilty, while here is the plea of *liberum tenementum*. Under that case we must concede that where the plea is the general issue, not guilty, there can be no appeal under this head. In this case there is the plea of *liberum tenementum*. Whilst all the books mention this plea, its long history is somewhat obscure, and the decisions touching its application are very numerous, and somewhat conflicting, in both England and America. So far as I am enabled to say it has been very little used in the Virginias, and the abstruse learning touching it is very little known. Yet there is much law book authority on it. Early in Virginia it was held to be a good plea. *Mangum v. Flowers*, 2 Munf. 205. In the sixth volume of Robinson's Practice, 780, is a full history of the plea. Once it was used only where the plaintiff's declaration was very general in its description of the land, not specifying it, and this plea performed the office of compelling a novel assignment, that is, a more definite description; but long since the plea has performed a wider function. So we find it stated in 21 Ency. P. & Prac., 840, where it is stated that the effect of the plea "is to confess that the plaintiff had possession of the close named generally at the time of the act complained of, and that such act was committed by the defendant as set forth, but to avoid the trespass by averring a right to enter and act as alleged." The plea in legal effect admits possession in the plaintiff such as would enable him to maintain the ac-

tion against a wrong-doer, and asserts a freehold in the defendant, with right to immediate possession as against the plaintiff. *Fort Dearborn Lodge v. Klein*, 115 Ill. 177. "The plea of *liberum tenementum* admits the fact that the plaintiff was in possession of the close described in the declaration; and that the defendant did the act complained of; raising only the question whether the close described was the defendant's freehold or not. And his title must be proved either by deed or other documentary evidence, or by an actual, adverse and exclusive possession for twenty years; inasmuch as, under this issue, he undertakes to show a title in himself, which shall do away with the presumption arising from the plaintiff's possession." 2 Greenleaf on Evidence, section 626. So it seems that this plea raises the question of title and boundary. What is the effect of verdict and judgment when the plea is in? It would seem that it would be conclusive upon the title. If so Dickinson's right to the land he claims would be concluded in this case, and this being so his suit involved title and he would be entitled to a writ of error. Investigation of the effect of verdict and judgment upon such plea will show a woeful conflict of authority upon it. Van Fleet's Former Adjudication, section 404, says: "If the title to land is put in issue and determined in an action of trespass, *q. cl. fr.*, it is concluded in Colorado, Illinois, New Hampshire, New York, Pennsylvania, South Carolina, Tennessee, and in the courts of the United States, England, and New South Wales, while the contrary is true in Massachusetts and Michigan." An investigation of the cases on the subject produces much doubt. It will so appear from Van Fleet in his further discussion. Van Fleet cites Pennsylvania for the rule of finality; but *McKnight v. Bell*, 135 Pa. St. 358, distinctly holds that a judgment upon such plea, when the only plea, is conclusive in a second action wherein the freehold is attempted to be put in controversy; yet such judgment is not conclusive of the title in a subsequent ejectment, especially when the plea of *liberum tenementum* was accompanied by a plea of not guilty, although it be shown that the only dispute on the first trial was as to title. *Elson v. Comstock*, 150 Ill. 303, 37 N. E. 207, holds such judgment a finality on title, if it appear from the record or be shown by oral testimony that the title was actually tried. See

Herman on Estop., section 281; *White v. Chase*, 128 Mass. 158; Bigelow Estop. 98. Now, the record in this case, including all the evidence, shows that title and boundaries were in controversy in this suit, and therefore it might be plausibly claimed that the case is one involving title and boundary. It is difficult to tell what rule should be laid down. In *Arnold v. Arnold*, 17 Pick. 4, the court denied the finality of a judgment upon such a plea. It said that a judgment upon an issue of soil and freehold was not conclusive in a writ of right. It said that the plea of soil and freehold, meaning *liberum tenementum*, would be supported by defendant proving an estate for his life, or that in a writ of right the property was in question. The court said that the action of trespass *quare clausum fregit* and the various writs of entry affect only the right of possession and entry and do not conclude as to the mere right. A tenant can sustain trespass against his landlord unlawfully entering upon his possession, and yet it would not be thought that the landlord would lose his title. Still in answer to this it may be said with success that the true matter of contest could be proven by parol, and thus prevent the loss of the landlord's title. I might pursue the many decisions upon this subject elsewhere, with the result only of producing confusion, not enlightenment. I doubt whether such a judgment would be a bar to the writ of right formerly used in Virginia to try the mere right, the very fee title, to land. And I doubt to-day whether it could so operate against an action of ejectment which now, with us, is a real action performing the functions formerly performed by the writ of right. The one relates to the possession, is a possessory action; the other touches the very right and title. We all know, as was said in *Greathouse v. Sapp*, above, that trespass is to recover mere damages for invasion of land, or rather invasion of possession, not to recover land. No writ of possession can issue under a judgment in an action of trespass. An appeal lies in an action of unlawful detainer, which is an element of title. Not so in trespass. It bears only indirectly, when it must bear directly, on title to give jurisdiction under this head. *Cook v. Daugherty*, 99 Va. 590; *McClagherty v. Morgan*, 36 W. Va. 192. See *Barret v. Coal Co.*, 51 W. Va. 420. * * *

We may say that this case does not touch title or boundary

so as to give that writ, and we dismiss it for want of jurisdiction, and decide nothing of the merits of the case.

*Reversed.*¹⁴

14. In *Kimball v. Hilton* (1898), 92 Me. 214, it was held that the gist of the action was invasion of a rightful possession, and title becomes important only in its effect upon the right of possession. Hence the judgment, where defendant pleads title, does not settle the title, for the defendant may have the title and yet the plaintiff have the right of possession.

WHY TRESPASS LIES ONLY FOR VIOLATION OF POSSESSION. "For centuries it has been common learning that the action of trespass *vi et armis* lies only where there is a wrongful invasion of possession. The conception of trespass, so far as it concerns injuries to personal or real property, embodies the idea of the violation of possessory right as well as the idea of forceful damage. Hence if one who has acquired a lawful possession of the property of another does damage to it he is not liable in an action of trespass though the application of force be direct and immediate. If there is any one principle upon which the common law seems to have committed itself fully and unequivocally it is upon this principle that the wrong of trespass is predicated upon the idea of the violation of possessory right. Trespass will not lie unless the right of possession be somehow violated or invaded.

"Now why should this be true? Is this principle grounded in the very nature of this action of trespass, or is it an artificial and accidental rule? Why cannot trespass be maintained against any one who does violent injury to the property of another, without regard to the question whether the one or the other has the legal possession of the property? Why is not the bailee of chattels or the lessee of land liable in trespass where he forcefully damages the chattels of his bailor or commits waste upon the premises of his landlord? The question is one deserving attention.

"The explanation of the rule is to be found, as might be expected, in certain facts of legal history. The action of trespass was in its origin a criminal action, and hence it would not lie for an act which did not constitute a breach of the peace or manifestly tend to a breach of the peace. This was the very ground on which the King's Bench assumed jurisdiction over the wrong. In the light of this idea it is easy to see how the law arrived at the proposition that only those acts which involve a violation of possessory right are trespasses.

* * * * *

"The principle that the action of trespass is maintainable only against one who violates possession manifests itself in various aspects. In regard to real property we note this consequence, to-wit, that if land is in the possession of a lessee or of a tenant, and a stranger does an injury to the premises, the lessee or the tenant is the person who is entitled to maintain trespass against the stranger. The landlord or remainderman must seek redress in some other remedy, such as the action of case. He cannot maintain trespass, because the tort-feasor has not violated his possession, but that of the tenant. 'Only the person who has the possession in fact of the real property to which an injury has been done can maintain an action of trespass *quare clausum*.'

"In the field of personal property the doctrine that trespass lies only at the instance of one whose possessory right is violated manifests itself in the early rule that the action of trespass is available only against the immediate wrong-doer or those who are so connected with the wrongful act as to be liable as principals with him. In the case of an asportation of chattels the remedy could not be used against a 'third hand,' that is, against one who got the goods from the original tort-feasor." 3 *Street on Foundations of Legal Liability*, 234.

SECTION 3. CASE.¹⁵

REYNOLDS v. CLARKE.

*Court of King's Bench. 1725.*1 *Strange, 634.*

Trespass for entering the plaintiff's yard; and fixing a spout there, *per quod* the water came into the yard and rotted the walls of the plaintiff's house.

[The defendant pleaded not guilty as to all, except entering the house and yard and fixing the spout on his own house; and as to that he justified, for that T. S. being seized in fee as well of the plaintiff's as of the defendant's house, which was adjoining to the yard belonging to the defendant's house, by indenture conveyed the house and yard to the plaintiff, with an exception in the deed of the free use of the yard, etc., to the said T. S. and to all the

15. DECLARATION IN CASE.

"For that whereas the said C D heretofore, to-wit, on, etc. (any day just before the injury was committed) and from thence, for a long space of time, to-wit, until, and at the time of the damage and injury to the said A B as hereinafter mentioned, to-wit, at, etc. (the venue is transitory) wrongfully and injuriously did keep a certain dog, he the said C D, during all that time, well knowing that the said dog then was used and accustomed to attack and bite mankind, to-wit, at, etc., aforesaid, and which said dog afterwards, and whilst the said C D so kept the same as aforesaid, to-wit, on, etc., aforesaid, at, etc., aforesaid, did attack and bite the said A B and did then and there greatly lacerate, hurt and wound one of the legs of him the said A B. And thereby he, the said A B, then and there became and was sick, sore, lame and disordered and so remained, and continued for a long space of time, to wit, for the space of six months then next following, during all which time he the said A B thereby suffered and underwent great pain, and was thereby then and there hindered and prevented from performing and transacting his lawful affairs and business, by him during that time to be performed and transacted; and also, by means of the premises, he, the said A B, was thereby then and there put to great expense, costs and charges, in the whole amounting to a large sum of money, to wit, the sum of — l. in and about endeavoring to be cured of said wounds, sickness, lameness and disorder, so occasioned as aforesaid, and hath been, and is, by means of the premises, otherwise greatly injured and damaged, to wit, at, etc. aforesaid. To the damage of the said A B of — l. and therefore he brings his suit, etc." 2 Chitty on Pleading, 238.

DISTINCTION BETWEEN TRESPASS ON THE CASE AND THE GENERAL ACTION ON THE CASE. Mr. Street, in his *Foundations of Legal Liability* (chap. XVIII), points out the fact that actions on the case were merely actions "*in consimili casu*" with the various formed actions provided for in the register of writs, and only such as were "*in consimili casu*" with trespass should technically be referred to as trespass on the case. He says: "We are bound to add that the authorities do not make the explicit distinction which is here drawn between trespass on the case and the general action on the case, and in the books the expressions 'trespass on the case' and 'action

tenants and occupiers of the defendant's house, which house was afterwards conveyed to the defendant; and averred that the spout so fixed was necessary for the use of the defendant's house, and so justified by virtue of that exception. Demurrer to this plea. * * * The counsel for the defendant * * * insisted, that the plaintiff was mistaken in his action, because trespass would not lie for fixing a spout in his own house; but that if the plaintiff had any damage thereby, he ought to bring an action on the case to recover what he was damnified, for he had a license to enter the yard, and could not be a trespasser for entering and fixing the spout on his own house.]"¹⁶

on the case,' or simply 'case,' are used interchangeably. The propriety of the distinction cannot, however, be doubted; neither can there be any doubt that the authorities themselves point to the distinction in that vague and obscure way which is indicative of inadequate analysis. In truth, if we push analysis far enough we shall perceive that under this head of trespass on the case, or action on the case, have been grouped together a number of really different remedies which have only the feature in common that they are all derived by an identical process of extension from the several distinct common-law remedies. Just as there is a specific action on the case in the nature of trespass (trespass on the case), so there are such specific actions as the action on the case in the nature of deceit, the action on the case in the nature of waste, the action on the case in the nature of nuisance, the action on the case in the nature of detinue (trover). And in addition to these specific forms of case there is, as was indicated above, the general residuary action which lies to recover redress for wrongs for which no specific remedy existed. * * *

"The various actions on the case are formless actions based on legal duty. In conformity with common modes of speech we should speak in the singular, and say that the action on the case is a formless action based directly on legal duty. * * * It is the great residuary remedy in the field of tort, just as *indebitatus assumpsit* is the residuary remedy in the field of contract. Wherever the law upon a particular state of facts imposes a pure legal duty, as distinguished from a contractual duty, the action on the case lies to enforce that duty or to recover damages for its breach provided no other form of action is available. * * * In the evolution of the common-law remedies the action on the case has served to keep remedy measurably abreast with the expanding conception of right, and to the existence of this remedy is largely to be attributed whatever truth is to be found in the ancient legal maxim *ubi jus ibi remedium*. In as much as the action on the case is a formless action and is founded directly on legal duty, an attempt to assign limits to its scope would be as vain as an attempt to define the limits of legal liability. The limits of legal liability are being constantly extended with the growth of society, and as long as there exists any sort of equilibrium between substantive and remedial law the scope of the action on the case must be likewise extended. * * *

"In regard to its substance it may be observed that the writ in actions on the case contains merely a recital of the facts which constitute the basis of the action. This recital is substantially repeated or perhaps abridged in the declaration. It is, of course, from the circumstance that the simple facts of the case are thus set forth in the pleading, that the action derives its name. The action on the case is a formless action based on the particular facts of the case."

16. The portion inclosed in brackets is taken from the report of the same case found in 8 Modern Reports, 272.

FORTESCUE, J.: Trespass is a ~~possessory~~ action, and does this invade the plaintiff's possession? The difference between trespass and case is, that in trespass the plaintiff complains of an immediate wrong, and in case, of a wrong that is a consequence of another act. * * *

CHIEF JUSTICE. We must keep up the boundaries of action, otherwise we shall introduce the utmost confusion; if the action in the first instance be unlawful, trespass will lie; but if the act is *prima facie* lawful (as it was in this case) and the prejudice to another is not immediate, but consequential, it must be an action upon the case; and this is the distinction. * * *

FORTESCUE, J.: Trespass will not lie for procuring another to beat me; if a man throws a log into the highway, and in that act it hits me, I may maintain trespass, because it is an immediate wrong; but if as it lies there I stumble over it, and receive an injury, I must bring an action upon the case; because it is only prejudicial in consequence, for which originally I could have no action at all.

REYNOLDS, J.: The distinction is certainly right; this is only injurious in its consequence, for it is not pretended that the bare fixing a spout was a cause of action, without the falling of any water; the right of action did not accrue till the water actually descended, and therefore this should have been an action upon the case.

PER CURIAM. *Judgment for defendant.*

SHARROD v. LONDON AND NORTHWESTERN RAILWAY COMPANY.

Court of Exchequer. 1848.

4 Exchequer, 580.

Trespass for driving a railway engine with great force and violence against and over the plaintiff's sheep, by means whereof they were killed.—Plea: not guilty.

* * * * *

PARKE, B. We are of opinion in this case that an action of trespass will not lie against the Company, the defendants.

The immediate act which caused the damage to the plaintiff's cattle, was an impact of a machine, which was under the control of a rational agent, the servant of the defendants; not so much so indeed as a horse, or carriage drawn by horses, or propelled by mechanical power along an ordinary highway, would be, in which cases both the direction and the speed of the machine are under government, but still in such a degree as to make the cases similar for the purpose of deciding the present question. We may treat the case, then, as if the damage had been done by an ordinary carriage drawn by horses; and, it being now settled that an action of trespass will lie against a corporation, we may consider, for the present purpose, the defendants as one natural person, and the carriage under the care of his servants. Now, the law is well established, on the one hand, that, whenever the injury done to the plaintiff results from immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass; on the other, that if the act be that of the servant, and be negligent, not wilful, case is the only remedy against the master. The maxim "*Qui facit per alium facit per se*" renders the master liable for all the negligent acts of the servant in the course of his employment; but that liability does not make the *direct* act of the servant the *direct* act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant, but not trespass, unless, as was said by the Court in *Morley v. Gainsford*, 2 H. Bl. 442, the act was done "*by his command*;" that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it; or some act which leads by a physical necessity to the act complained of. The former is the case, when one, as servant, is ordered to enter a close to try a right or otherwise; the latter, when such a case occurs as *Gregory v. Piper*, 9 B. & C. 591, where rubbish, ordered to be removed, from a natural necessity fell on the plaintiff's soil; but, when the act is that of the servant in performing his duty to his master, the rule of law we consider to be, that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant, a rational

agent. The agent's direct act or trespass is not the direct act of the master. Each blow of the whip, whether skilful and careful or not, is not the blow of the master; it is the voluntary act of the servant; nor can it, we think, be reasonably said that all the acts done in the skilful and careful conduct of the carriage are those of the master, for which he is responsible in an action of trespass, to the same extent as if he had given them himself, because he has impliedly ordered them; but those that are careless and unskilful were not, for he has given no order, except to use skill and care.

Our opinion is, that, in all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in an action on the case, for want of skill or care of the agent,—no more; consequently, this action cannot be supported.

We should observe, that, though the master in this case is taken to have ordered the driver of the engine to proceed at great speed, it did not follow as a *necessary* consequence that it would impinge on the plaintiff's cattle. It might not have happened, if the driver had seen the cattle sooner, or the cattle had heard the engine, and got out of the way. The act, therefore, cannot be treated as a trespass, on the ground that it was, by necessary implication, ordered to be done by the defendants—the principle on which the case of *Gregory v. Piper* was decided. This is the simple case of an act done by the servant in the course of his employment, not specifically ordered by the master; and though the injury by such an act be *direct* so far as relates to the servant, we have recently held that a master would not be responsible in trespass: *Gordon v. Rolt*, Ante, p. 363.

If in the present case the plaintiff's cattle had a right to be on the railway, the plaintiff has a remedy, by an action on the case against the Company for causing the engine to be driven in such a way as to injure that right; for the defendants are bound to see that their carriages did not travel at such a speed as to make it impossible to avoid other persons, who had a lawful right to be there.

If the cattle were altogether wrong-doers, there has been no neglect or misconduct for which the defendants are responsible.

If the cattle had an excuse for being there, as if they had escaped through defect of fences which the Company should have kept up, the cattle were not wrong-doers, they had no right to be there; and their damage is a consequent damage from the wrong of the defendants in letting their fences be incomplete or out of repair, and may be recovered accordingly in an action on the case.

Rule absolute.

PERCIVAL v. HICKEY.

Supreme Court of New York. 1820.

18 Johnson, 257.

This was an action of *trespass*, for running down the vessel of the defendant at sea, tried before MR. JUSTICE YATES at the New York Sittings, in April, 1819. * * *

* * * * *

SPENCER, C. J.: The verdict of the jury was for the plaintiff; and agreeably to an intimation from the judge, that if they found for the plaintiff, they should state the grounds of their verdict, they added, *that the disaster was the result of gross negligence in the defendant.* Among the points taken, on the motion for a new trial, it has been strenuously urged by the defendant's counsel, that the action should have been *case*, and not *trespass*. This point is open to the defendant, because in the progress of the trial, a motion was made for a nonsuit, after the plaintiff had gone through with his evidence, on that ground.

We must consider, after the finding of the jury, that the injury done, by running down the plaintiff's vessel, was not designed, or intentional; but that it proceeded from the defendant's negligence, as captain and commanding officer of the *Atalanta*. We are bound, also, to consider the negligence as a personal one, imputable to the acts and omissions of the defendant; and that these acts and omissions were gross and palpable.

That the force by which the plaintiff's vessel was destroyed, was the immediate cause of her destruction, proceeding from the collision, cannot be doubted; and then the question arises, whether, if such an act, producing the

injury immediately and directly, be the result of negligence, and not of a wilful intention, the action ought to be trespass or case. In the case of *Leame v. Bray*, (3 East, 593) all the authorities and preceding cases bearing on this question, were reviewed. That was trespass, charging the defendant with having drove and struck a single horse chaise which the defendant was driving along the highway, with such great force and violence upon and against the plaintiff's curricule, which his servant was driving, that by means thereof, the servant was thrown out, and the horses ran away with the curricule; and the plaintiff, to preserve his life, jumped and fell from the same, and fractured his collar bone. It appeared in evidence, that the accident happened on a dark night, owing to the defendant's driving his carriage on the wrong side of the road, the parties not being able to see each other, and that if the defendant had kept the right side of the road, there was ample room for the carriages to pass without injury, but it did not appear that blame was imputable to the defendant in any other respect; and on an objection, that the injury happened from negligence, and was not wilful, and that the proper action was case, and not trespass *vi et armis*, the plaintiff was nonsuited. After argument, the nonsuit was set aside by the unanimous opinion of the court. Lord ELLENBOROUGH said, the true criterion seemed to be, according to what Lord CH. J. DE GREY said, in *Scott v. Shepard* (3 Wils. 411, S. C. 2 Bl. Rep. 892), whether the plaintiff received an injury by force from the defendant; that if the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis*, by all the cases both ancient and modern; that it was immaterial, whether the injury be wilful or not; * * * GROSE, J., expressed himself very decidedly; he observed, that in looking into all the cases from the year-book in the 21 H. VII down to the latest decision on the subject, he found the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally, or by misfortune, yet he is answerable in trespass. LE BLANC, J., is equally explicit. He says, "In all the books, the invariable principle to be collected is, that where the injury is immediate on the act done, there trespass lies; but where it is not

immediate on the act done, but consequential, then the remedy is in case." * * * The case of *Covel v. Laming*, (1 Camp. N. P. Rep. 497) which was subsequent to the case of *Leame v. Bray*, was an action of trespass for running the defendant's ship against the plaintiff's. It appeared, that when the accident happened, the defendant stood at the helm, and that he wished to steer clear of the plaintiff, and if he was to blame, it was through ignorance and unskilfulness. On the objection that trespass would not lie, Lord ELLENBOROUGH, confirmed the doctrine he had delivered in *Leame v. Bray*, and said, it made no difference that the parties were sailing on shipboard. The defendant was at the helm, and guided the motions of his vessel. The winds and the waves were only instrumental in carrying her along in the direction which he communicated; the force, therefore, proceeded from him, and the injury the plaintiff sustained was the immediate effect of that force; and the plaintiff had a verdict.

The Court of Common Pleas have, undoubtedly, questioned the correctness of the decision in *Leame v. Bray*, though they have not overruled it. * * * In *Blinn v. Campbell*, (14 Johns. Rep. 432) the plaintiff sued in an action on the case, and it appeared that the defendant, being a trooper, had wounded the plaintiff's leg, by negligently firing a pistol. We held, that if the injury is attributable to negligence, though it were immediate, the party injured has his election, either to treat the negligence of the defendant as the cause of action, and declare in case, or to consider the act itself as the injury, and to declare in trespass. The rule is laid down in the same manner in 1 Chitty Pl. 127, and is warranted by the cases he cites.

I am perfectly satisfied, from a review of the cases, that if the defendant is liable at all, this action is appropriate, and that it ought to have been trespass rather than case, as the injury was immediate, and from gross negligence.¹⁷

[Motion for a new trial allowed on other grounds.]

* * * * *

17. That trespass will lie for a direct though unintentional injury: *Welch v. Durand* (1869), 36 Conn. 182; *Brown v. Kendall* (1850), 6 Cush. (Mass.) 292.

NEVIN v. THE PULLMAN PALACE CAR COMPANY.

*Supreme Court of Illinois. 1883.**106 Illinois, 222.*

Mr. Justice MULKEY delivered the opinion of the Court:

This was an action on the case, brought by Luke Nevin, the plaintiff in error, in the circuit court of McLean county, against the Pullman Palace Car Company, the defendant in error, for refusing to permit him to occupy a sleeping berth in one of its cars, which had been assigned to him, and which he was ready and offered to pay for. The circuit court sustained a general demurrer to the declaration, and the plaintiff elected to stand by his declaration, judgment was entered against him for costs, which, on appeal, was affirmed by the Appellate Court for the Third District, and the plaintiff in error brings the record here for review.

The declaration, omitting mere formal averments and unnecessary verbiage, charges, in substance, that the plaintiff, on the 4th day of August, 1881, at Dubuque, Iowa, purchased of the Illinois Central Railroad Company, for his niece, wife and himself, respectively, three first-class passenger tickets over that company's railway, from Dubuque, Iowa, to Chicago, this State; that having provided himself with these tickets, he, together with his wife and niece, about ten o'clock of the night of that day, and just before the train from Dubuque to Chicago started out, entered a sleeping car called "Kalamazoo," belonging to and constituting a part of said train, which said sleeping car was then in the possession and under control of the defendant; that upon entering the car he engaged of the conductor of said car two lower berths, at one dollar and fifty cents each; that the conductor thereupon assigned one berth to his niece, and one to plaintiff and his wife, promising to have them made up a little later in the night; that he and his wife took seats in the berth assigned to them, and remained sitting up, in an orderly manner, until about twelve o'clock, frequently, in the meantime, requesting the conductor to have the berths made up, so they could retire to rest, and at the same time tendering to him the price agreed to be paid therefor; that on the arrival of the train at Lena, this

State, about the hour just stated, plaintiff temporarily left his seat, and stepped out on the platform of the sleeper, intending to return immediately to his berth, when the conductor instantly closed and secured the outer doors of said sleeper, and thereby prevented him from again entering the same; that plaintiff endeavored to open said doors and re-enter said car, and frequently requested the conductor to permit him to do so, but that said conductor, instead of complying with his request, removed his satchel, coats and shoes from the berth so assigned to him and his wife, to another car, and ejected the latter from said sleeper, by means of which plaintiff was compelled to take and occupy a seat in a common passenger car on said train till its arrival in Chicago, by reason of which plaintiff was deprived of his rest and sleep, in consequence of which "he became exceedingly weary and sick, and was greatly humiliated," etc.; that his expulsion from his berth in the manner stated was done willfully and maliciously, and that the only reason assigned by the conductor for refusing the price of the berths was, "that they were not made up."

It is not claimed or pretended, as we understand counsel, that the facts alleged in the declaration do not show a good cause of action, but the claim rather is, that they disclose a right to recover in *assumpsit*, and not in case,—or, in other words, the contention is, that the plaintiff has misconceived his action; that the only wrong complained of consists of a breach of an express contract, and therefore the action should have been brought in form of *ex contractu*, and not in form *ex delicto*, as it was.

* * * * *

* * * Is it true, as a universal proposition, that this form of action will not lie in any case where the conduct complained of is a direct breach of an express contract? Certainly not. A simple illustration will demonstrate the fallacy of such a position. Suppose A contracts with B to keep the latter's horse for an indefinite period at fifty cents a day, the horse to be returned to B on demand, and A, after having been paid all charges for the keep of the horse, should refuse to re-deliver him to B, on demand, no one, in such a case, would question for a moment the right of B to maintain an action of trover against A for the horse, which is one species of the action on the case,—and yet, in the case supposed, the refusal of A to redeliver the

horse, the real cause of action is, in the strictest sense of the term, a direct breach of the special contract between the parties. * * *

It is a familiar doctrine that case will lie for a mere nonfeasance against persons exercising certain public trades or employments, where no contractual relation exists between them and the plaintiff, as, where a common carrier, having the requisite means of transportation, refuses to carry goods or passengers. Chitty, in discussing this matter, in his work on Pleadings, says: "There are, however, some particular instances of persons exercising certain public trades or employments, who are bound by law to do what is required of them in the course of their employments without aid of express contract, and are in return entitled to a recompense, and may, therefore, be sued in case, as for a breach of duty in refusing to exercise their callings,—as, where a common carrier, having conveniences, refuses to carry goods, being tendered satisfaction for the carriage; or an inn-keeper to receive a guest, having room for him; or a smith, having materials for the purpose, to shoe a horse for a traveler; or a ferryman to convey one over a common ferry, and the like." (Vol. 1, 136). It is clear, from the language of this author, the classes of persons enumerated are intended as mere examples of the application of the general principle stated, and not as a limitation of the rule itself, and by a well recognized rule of the common law the same principle should be extended to all other trades and callings that bear the same relation to the public as those just enumerated, and the fact that no precedent can be found for it is entitled to but little consideration, when it is clear the case in hand falls within the principle. This is particularly true with respect to extending as a remedy the action we are considering, to new states of facts, where they clearly fall within the general principle upon which the action is maintained. To the objection there was no precedent for the action made on a certain occasion before PRATT, Ch. J. (afterwards Lord CAMDEN), he is reported to have said: "I wish never to hear this objection again. The action is for a tort. Torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief." Indeed, the writ in case, as its very name imports, was invented for the express purpose of giv-

ing a remedy where none of the old forms of writs were applicable. * * *

Since, as we have just seen, certain legal consequences affecting the question we are considering result from the exercise of certain public trades or employments, it becomes important to determine, with some degree of particularity, the true relation which the Pullman Palace Car Company sustains to the public, and to point out, so far as we are able, the difference between it and persons or companies exercising public callings or employments like those above enumerated, if indeed, any such difference exists. Like an ordinary railway company engaged in the transportation of freight and passengers, this company transacts its entire business, so far as it relates to this case, over the various railways in this and other States. Like railway companies it exercises special privileges and franchises granted to it by the State, and its business is transacted almost exclusively with the traveling public. * * * In what respect, then, does this company differ in its relation to the public, so far as the present inquiry is concerned, from an ordinary railway company? No difference has been pointed out by counsel, and we are confident none can be. * * *

If, then, this company owes any duties to the community by reason of its relation to the public, as we hold it does, manifestly one of them is, that it shall treat all persons whose patronage it has solicited with fairness, and without unjust discrimination. When, therefore, a passenger, who, under the rules of the company, is entitled to a berth upon payment of the usual fare, and to whom no personal objection attaches, enters the company's sleeping car at a proper time for the purpose of procuring accommodations, and in an orderly and respectful manner applies for a berth, offering or tendering the customary price therefor, the company is bound to furnish it, provided it has a vacant one at its disposal. * * * Holding then, as we do, where there are sleeping berths not engaged, it is the duty of the company, upon the payment or tender of the customary price, to furnish them to applicants when properly called for by unobjectionable persons, it follows the defendant was not justifiable in refusing to let the plaintiff have one for himself and wife, and it is well settled the fact there was a special contract between the company and the plain-

tiff, upon which an action of *assumpsit* might have been maintained, does not at all affect the right to recover in the present form of action, which is founded upon the defendant's common-law liability, as above stated.

But outside of this view, of the soundness of which we have no doubt, the same result may be reached by a somewhat different process, though the principle, perhaps, is the same in both cases. Let us assume, then, for the purposes of the argument, the defendant owes to the public no common-law duties in the absence of any contract relating to its business. It would then follow the defendant is under no obligation to the plaintiff, except such as grew out of the contract entered into between them. But it does not follow that all the duties growing out of the contract on either side must have been expressly stipulated for. On the contrary, nothing is better settled than that in many contracts, especially those which establish peculiar relations between the parties, as, those of confidence and trust, the law silently annexes certain conditions, and imposes mutual obligations and duties, which are not all, in express terms, provided for in the contract, yet, in contemplation of law, they are nevertheless regarded as a part of the contract, and the nonperformance of them may, in an action on the contract, be assigned as a breach thereof. But while *assumpsit* will certainly lie for a breach of these implied duties, it is equally well settled that case will lie also. Strictly speaking, these duties arise *ex lege* out of the relation created by the contract. As familiar illustrations of this class of contracts, which give rise to an almost infinite variety of implied duties and obligations, may be mentioned those between client and attorney, physician and patient, carrier and shipper, and, in short, every species of bailment. In all these and analogous cases it is conceded case is a concurrent remedy with *assumpsit* for a breach of implied duties growing out of any of these relations.

Now, when we look at the contract between the plaintiff and defendant, the character of the business of the company, the subject matter of the contract, the relations of the parties with respect to such subject matter, and all the circumstances attending the transaction, can it be doubted for a moment that the contract falls within the same class of contracts as those between carrier and passenger, and the like? Can it be questioned that upon assigning the two

berths to the plaintiff upon the terms which he agreed to and offered to comply with, and which the company agreed to accept, the contract thus made at once became obligatory and binding upon the parties, and that it established a special relation between them, such as that between carrier and passenger, and the like, to which the law, of its own force, annexed certain implied obligations and duties, to be respectively observed and performed by the parties towards each other? Clearly not. What were some of these implied duties? On the part of the plaintiff, he impliedly agreed to conduct himself in a quiet and orderly manner, to take due and proper care of the berths while in his possession, and surrender the same at the end of his journey in as good condition as when assigned to him, necessary wear excepted. On the part of the company it was impliedly stipulated that it would use all reasonable and proper means within its power to preserve order and decorum in the sleeper during the journey, and especially during sleeping hours, and that it would furnish and keep on hand such supplies and conveniences as are usually found in like sleepers, and are necessary to the health and comfort of passengers, and also that it would permit the plaintiff to quietly and peacefully occupy the berth engaged by him during the journey, and not expel him or his wife from the car or such berth, or otherwise attempt to interfere with its proper use and enjoyment, so long as he and his wife demeaned themselves with propriety. None of these duties were, or ever are, expressly stipulated for by one engaging a sleeping berth, for the simple reason the law always implies them from the relation of the parties created by the contract securing a berth; and for a breach of any of these implied duties, it is clear, as already shown, case is a concurrent remedy with *assumpsit*, and, indeed, is always the more appropriate remedy where matters of aggravation are relied on as an element of damage. It is clear, in the present case the defendant utterly disregarded its duty in not making up the berth of the plaintiff, and in not permitting him and his wife to occupy it through the night, and in expelling them from the car, and for this it must be held liable.

In view here expressed is believed to be in consonance with the general principles of the law, and is clearly sustained by some of the best considered cases, both English

and American. *Burnett v. Lynch*, 5 Barn. & Cress. 589; 11 Eng. Com. Law, 597; *Hancock v. Coffin*, 21 Eng. Com. Law, 318; *Dickson v. Clifton*, 2 Wils. 319; *Boorman v. Brown*, 3 Adol. & E. (N. S.) 525. In this last case, Chief Justice TINDAL, in delivering the judgment in the Exchequer Chamber, entered into an extended review of the authorities, and in summing up used this language: "The principle in all these cases would seem to be, that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort,"—and this case was affirmed on appeal to the House of Lords. (11 Cl. & Fin. 44) In this case, Lord CAMPBELL, in delivering the judgment in the House of Lords, says: "I think the judgment of the Court of Exchequer Chamber is right, for you can not confine the right of recovery merely to those cases where there is an employment without any special contract. But wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of the duty in the course of that employment the plaintiff may recover, either in tort or in contract." This, subject to the limitation hereafter to be stated, we regard as the true rule on the subject.

It is often, and indeed generally, stated, the action lies only for the breach of a common-law duty, and this we believe to be strictly true; yet there is some confusion in the cases as to what is meant by a common-law duty, growing out of the fact that it sometimes arises without the intervention of a contract and sometimes with it, and in the latter case it is often said, as in the case last cited, "the contract creates the duty," and while this is true and accurate enough in a certain sense, yet when we attempt to define with precision just when the action will lie and when it will not, the statement is not sufficiently definite, for it must be conceded the law makes it the duty of every one to perform his contract, and it is clear case will not lie for the breach of every duty created by contract. If one contracts to deliver to another a load of wood, or pay a specific sum of money on a given day, and fails to do so, an action on the contract alone will lie—and yet it is manifest, in the case supposed, there has been a breach of duty created by the contract. We think it more accurate, therefore, to say, that case lies only for the breach of such duties

as the law implies from the existing relations of the parties, whether such relations have been established with or without the aid of a contract; but if created by contract, it is no objection to the action that the performance of the duty in question has been expressly stipulated for, if it would have existed by reason of such relations without such stipulation. This is well illustrated by the case put in the early part of this opinion, where B let his horse to A, to be kept at a stipulated price per day, and returned on demand. Now, in that case, by the mere delivery of the horse, to be kept at the price agreed upon, the law implied or imposed the duty of returning him upon demand, without any agreement to that effect, and the duty being thus implied by law, independently of the express stipulation for its performance, case clearly would lie for its breach.

The general principle seems to be this: Where the duty for whose breach the action is brought would not be implied by law by reason of the relations of the parties, whether such relations arose out of a contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract, and not in tort—when otherwise, case is an appropriate remedy. Of course, *assumpsit* is a concurrent remedy with case, in all cases where there is an express or implied contract.

The judgment of the Appellate Court is reversed, and the cause remanded, with directions to that court to reverse the judgment of the circuit court, and remand the cause for further proceedings not inconsistent with the views here expressed.

Judgment reversed.

DALTON v. FAVOUR.

Superior Court of Judicature of New Hampshire. 1826.

3 New Hampshire, 465.

Trespass on the case, for that the said Favour, on the 27th September, 1825, at D. having in his hands a firelock, highly charged with powder, and a great quantity of wadding, so exceedingly carelessly managed his said firelock,

that he discharged its contents into the foot of the plaintiff; whereby he was put to great pain, etc.

* * * * *

Mr. Chief Justice RICHARDSON delivered the opinion of the court.

The principles, upon which the decision of this case must depend, are well settled in the books.

In all cases, where the injury is done with force and immediately by the act of the defendant, trespass may be maintained. 1 Chitty's Pl. 122.—3 East. 593, *Leame v. Bray*.—19 Johns. 381.—18 Ditto, 257, *Percival v. Hickey*.

And in every case, where the injury is the immediate effect of the defendant's act, and is stated in the declaration, or appears upon the trial, to have been wilfully done, the remedy must be trespass. 1 Chitty Pl. 127.—8 D. & E. 188, *Ogle v. Barnes*.—6 D. & E. 128. And *Savingnac v. Roome*, 6 D. & E. 125.—5 D. & E. 648, *Day v. Edwards*.

But where the damage or injury ensues, not directly from the act of the defendant, the remedy must be case. 1 Chitty Pl. 126.

In all cases, where the injury is attributable to negligence, although it were the immediate effect of the defendant's act, the party injured has an election, either to treat the negligence of the defendant as the cause of action, and declare in case; or to consider the act itself as the cause of the injury, and declare in trespass. 1 Chitty's Pl. 127.—5 Bos. & Puller, 117, *Rogers v. Imbleton*.—3 Burrows, 1560.—5 B. & P. 447, note.—3 East 600 and 601.—8 D & E. 188, *Ogle v. Barnes*.—14 Johns. 432, *Bliss v. Campbell*, where it was decided, that case might be maintained for wounding the plaintiff's leg by negligently firing a pistol. 1 Bos. & Puller, 472, *Turner v. Hawkins*.

In the case now before us, it did not appear, that the injury was wilfully done, but it was the consequence of great carelessness. This is an instance then, where either trespass or case may be maintained; and there must be

*Judgment on the verdict.*¹⁸

18. The distinction here pointed out was not clearly observed in *Case v. Mark* (1825) 2 Ohio, 169. The court there criticized the doctrine that there could ever be an election between trespass and case, on the ground that it would destroy the distinction between the two forms of action. Such a rule, says the court, amounts to this, that the plaintiff "may take up an entire, connected transaction by parts, and rely on as much of it as will answer his purpose, to the exclusion of the residue. * * * Were

this permitted, I can not conceive of any trespass that may not be sued for in the form of case. What are the ordinary concomitants of a severe battery? They are pain, bodily and mental—incapacity for business—the expense of medical aid, and disgrace in the public estimation. If under the pretense of waiving the immediate injury, which is pain, the party may go for the consequential damage, which is the incapacity for business, expense, etc., it will be a matter of but little moment whether he sue in trespass or in case, as the only difference in the result would be the portion of damage that might be allowed for the pain inflicted.” The weakness of this criticism is that the court confuses the items of damage with the wrongful acts. Assuming that a battery results from negligence, there are two wrongful acts, the negligence which results in the battery and the battery itself. Either one of these wrongful acts may be sued upon as the basis of liability. If the former is employed, the injuries—all of them, not merely the pain—are only an indirect result; while if the latter is employed, these injuries result directly and immediately therefrom. The damages might be the same in both forms of action, but the foundation of the liability would be different in each. See *Johnson v. Castleman* (1834) 2 Dana (Ky.) 374; *Wilson v. Smith* (1833) 10 Wend. (N. Y.) 324.

CASES IN WHICH AN ELECTION IS PERMITTED.

Malicious Prosecution. If the malice and falsehood be put forward as the *gravamen* the action may be case, while if the arrest or other act of trespass be counted upon as the gist of the action, trespass will lie: *Morris v. Scott* (1839) 21 Wend. (N. Y.) 281; *Hays v. Younglove* (1847) 7 B. Mon. (Ky.) 545.

Conversion. If the taking is the ground of the action trespass is proper, but the conversion may be counted upon as disclosing an action in case (*trover*). *Claffin v. Wilcox* (1846) 18 Vt. 605.

Seduction. If the action is based on loss of services it is case, but if the defendant illegally enters the premises of the plaintiff to accomplish the act, this entry may be made the ground of an action of trespass *quare clausum*: *Mercer v. Walmsley* (1820) 5 Har. & J. (Md.) 27; *Sargent v. —* (1825) 5 Cow. (N. Y.) 117; *Parker v. Meek* (1855) 3 Sneed (Tenn.) 29.

Criminal Conversation. It seems to have been common practice to employ either trespass or case, though the reason for allowing trespass does not appear to be very satisfactory: *Woodward v. Walton* (1807) 2 Bos. & Pul. N. R. 476; *Haney v. Townsend* (1821) 1 McCord L. (S. C.) 206; *Macfadzen v. Olivant* (1805) 6 East, 387.

Kelly v. Lett (1851) 13 Ired. L. (N. C.) 50, has an interesting discussion of the right to elect between trespass and case, and suggests that this right is an indulgence granted on account of the difficulty in tracing the dividing line between the two forms of actions.

SYNOPSIS OF CASES IN WHICH TRESPASS ON THE CASE WILL LIE.

“We have before remarked that an action upon the case was a remedy given by the common law, but that it appears to have existed only in a limited form, and to a certain prescribed extent, until the statute of Westminster 2. In its most comprehensive signification it includes *assumpsit* as well as an action in form *ex delicto*; but at the present time, when an action on the case is mentioned, it is usually understood to mean an action in form *ex delicto*. * * *

“Actions on the case are founded on the common law, or upon acts of parliament, and lie generally to recover damages for torts not committed with force, actual or implied; or having been occasioned by force, where the matter affected was not tangible, or the injury was not immediate, but consequential; or where the interest in the property was only in reversion; in all which cases trespass is not sustainable. [4 T. R. 489; 7 T. R. 9.] Torts of this nature are, to the absolute or relative rights of persons, or to personal property in possession or reversion, or to real property, corporeal or incorporeal, in possession or reversion. These injuries may be either by nonfeasance, or the omission of some act which the defendant ought to

perform; or by *misfeasance*, being the improper performance of some act which might lawfully be done; or by *malfeasance*, the doing what the defendant ought not to do; and these respective torts are commonly the performance or omission of some act contrary to the general obligation of the law, or the particular rights and duties of the parties, or of some express or implied contract between them.

"Case is the proper remedy for an injury to the *absolute rights of persons* not immediate, but consequential [11 Mass. 137; 2 Dana (Ky.) 378; 18 Johns. (N. Y.) 257; 19 Johns. (N. Y.) 381; Harper (S. C.) 43; 1 Marsh. (Ky.) 194; 6 Call (Va.) 44]; as for keeping mischievous animals, having notice of their propensity [16 Conn. 200; 23 Wend. (N. Y.) 254; 7 Ala. 160; 15 Vt. 404], or for special damage arising from a public nuisance [Willes, 71 to 75; 11 East, 60; 3 Vt. 521; 6 Dowl. & Ry. 275]. But if the injury were immediate, as if the defendant incited his dog to bite another, or let loose a dangerous animal; or if in the act of throwing a log into a public street, it hurt the plaintiff; or if an injury be committed by cattle to land; the action should be trespass. Also, whenever an injury to a person is occasioned by *regular process* of a Court of competent jurisdiction, though maliciously adopted, case is the proper remedy, and trespass is not sustainable [3 T. R. 185; 1 T. R. 535; 3 Esp. 135; 11 East, 297; 1 Campb. 295; 2 Chit. 304; 2 Conn. 700; 11 Mass. 500; 6 Greenl. (Me.) 421; 3 Gill & Johns. (Md.) 377; 6 Wend. (N. Y.) 382]; as for a malicious arrest; or for malicious prosecution of a criminal charge before a magistrate or otherwise [Chit. Rep. 304]. If the proceeding be malicious and *unfounded*, though it were instituted by a Court having no jurisdiction, case may be supported, or trespass [2 Wils. 302; 7 B. Mon. (Ky.) 545]. Formerly it was usual in these instances, where several persons combined in the prosecution, to proceed by writ of conspiracy, but the action on the case is now the usual remedy [1 Saund. 228; 6 Watts (Pa.) 304]. If, on the other hand, the proceeding complained of were *irregular*, the remedy in general must be trespass; and therefore, where a justice of the peace maliciously and irregularly granted a warrant against a person for felony, without any information upon oath, it was decided that the remedy against the justice should have been trespass and not case [2 T. R. 225; 2 Chit. Rep. 304; 12 Serg. & R. (Pa.) 210; 6 Munf. (Va.) 27; Hardin (Ky.) 490; 7 Cow. (N. Y.) 269]. * * *

"Case, as we have seen, is also the proper remedy, where the *right affected* was *not tangible*, and consequently could not be affected by force, as reputation and health, the injuries to which are always remediable by action on the case; as, libels, or verbal slander. It is also the only remedy against sheriffs, justices, especially after convictions quashed, or other officers acting ministerially and not judicially, for refusing bail or to receive an examination upon the statute of hue and cry, etc. [1 Leon. 323]; and case lies against surgeons, agents, etc., for improper treatment, or for want of skill or care; though *assumpsit* is also sustainable [8 East, 348].

"Actions for injuries to the *relative rights of persons*, as for seducing or harboring wives, enticing away or harboring apprentices or servants, are properly in case; though it is now usual, and perhaps more correct, to declare in trespass *vi et armis* and *contra pacem*, for criminal conversation and for debauching daughters and servants [2 New Rep. 476] 2 M. & Sel. 436]; yet as the consequent loss of society or service is the ground of action, the plaintiff is still at liberty to declare in case [5 East, 39; 5 Greenl. (Me.) 446; 7 Blackf. (Ind.) 578; 21 Wend. (N. Y.) 79; 8 Serg. & R. (Pa.) 36; 5 Harr. & J. (Md.) 27; 8 Conn. 130; 4 Cow. (N. Y.) 412]. * * *

"For injuries to *personal property* not committed with force or not immediate, or where the plaintiff's right thereto is in reversion [3 Campb. 187], case is the proper remedy. It lies against attorneys or other agents for negligence or other breach of duty or misfeasance in the conduct of a cause, or other business [15 Mass. 316; 8 Mass. 51; 11 Johns. (N. Y.) 479], etc., though it has been more usual to declare against them in *assumpsit* [6 East, 333]. And though we have seen that *assumpsit* is the usual remedy for neglect or breach of duty against bailees; as against

carriers, wharfingers, and others having the use or care of personal property, whose liability is founded on the common law as well as on the contract; yet it is clear that they are also liable in case for an injury resulting from their neglect or breach of duty in the course of their employ [2 B. & B. 54; 6 B. & C. 268]. For any misfeasance by a party in a trade which he professes, the law gives an action on the case to the party agrieved against him; as if a smith in shoeing my horse prick him, and other like cases [1 Saund. 312, a]. And it seems that though there be an express contract, still if a *common-law duty* results from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract [2 Wils. 319; 5 B. & C. 605; 8 D. & R. 378; 2 Chit. Rep. 1]. * * *

"With regard to *nonfeasance*, or the neglect to perform the contract, not even an action of *assumpsit*, much less an action upon the case, can be maintained, if no consideration existed and be stated in the declaration, to give validity to the defendant's alleged obligation to do the act. * * * There are, however, some particular instances of persons exercising certain public trades or employments who are bound by law to do what is required of them in the course of their employments, without the aid of an express contract, and are in return entitled to a recompense, and may therefore be sued in case, as for a breach of duty in refusing to exercise their callings. As where a common carrier, having convenience, refuses to carry goods, being tendered satisfaction for the carriage; or an innkeeper to receive a guest, having room for him; or a smith, having materials for the purpose, to shoe the horse of a traveller; or a ferryman to convey one over a common ferry, and the like [1 Saund. 312, c. note 2; 5 T. R. 149]. * * *

"Case is necessarily the form of action to be adopted for *deceitfully representing* a person to be fit to be trusted or other deceit, independently of and without relation to any contract between the parties [2 East, 22; 3 T. R. 51; 4 Bing. 73; 13 Johns. (N. Y.) 226]. And for fraudulent representations not introduced into a written contract between the parties, respecting the subject matter of the representations, case is the proper remedy, if any [4 Campb. 22; 3 Caines (N. Y.) 216]. * * * If goods be obtained on credit through a fraudulent contract, the proper remedy is case or trover, at least before the expiration of the credit; for if before that time he sue in *assumpsit* for goods sold, he recognizes or affirms the contract and may be successfully met by the objection that the credit has not expired [9 B. & C. 59]. * * *

"This action also lies for the rescue or pound breach of cattle, or goods distrained for rent or *damage feasant*; or for the rescue of a person arrested on mesne process; or for an excessive levy on a *feri facias* [9 B. & C. 840]; and against sheriffs, etc., for escapes, on mesne or final process; * * * case also lies for not delivering letters, etc. [3 Wils. 443]; and against a witness for not obeying a writ of subpoena [Doug. 556; 9 East, 473; 13 East, 17, n. c.]; and for infringing the copyright of a book, print, single sheet of music, or other work [11 East, 244; 1 Campb. 94, 98], and for the infringement of a patent, and for obstructing the proprietor of tithes from entering on land to take them away [2 New Rep. 466]. For injury to any personal property in reversion, trespass or trover can be supported; and case is the only remedy [7 T. R. 9; 3 Campb. 187]. * * *

"With respect to injuries to *real property corporeal*, where the injury was immediate, and committed on land, etc., in the possession of the plaintiff, the remedy is trespass [1 Ld. Raym. 188]; but for nonfeasance, as for not carrying away tithes; or where the injury is not immediate but consequential, as for placing a spout near the plaintiff's land, so that water afterwards ran thereon, or for causing water to run from the defendant's land to that of the plaintiff. [Str. 634; Ld. Raym. 1399; 2 Burr. 1114]; or where the plaintiff's property is only in reversion, and not in possession, the action should be in case [8 Pick. (Mass.) 235; 2 Greenl. (Me.) 8; 7 Conn. 328; 11 Mass. 520; 1 Johns. (N. Y.) 511; 3 Johns. (N. Y.) 468; 2 N. H. 430; 3 N. H. 103]. * * *

"We may remember that trespass cannot in general be supported where the matter affected is not substantial, or the estate therein is *incorporeal*.

Case therefore is the proper remedy for disturbance of common of pasture, turbary, or estovers. * * * So case is the proper form of action for obstructing a private way [14 Johns. (N. Y.) 383; 7 Har. & J. (Md.) 67], or a public way, *per quod* the plaintiff was delayed on his journey, and obliged to take a more circuitous route [9 Moore, 489], or sustained some other special damage [5 Blackf. (Ind.) 35]. So case is the proper remedy for disturbing a party in the possession of a pew in a church; * * *

"Case is in general the remedy for disturbing a party in the enjoyment of an easement [5 B. & A. 361; 5 B. & C. 221; 7 D. & R. 783; 8 B. & C. 288; 2 Vt. 68], and it may be maintained in that instance, although the right to the easement were conferred by a written agreement, which is stated in the declaration, and which stipulates for the enjoyment of the easement [3 Wils. 348; 6 B. & C. 273; 9 D. & R. 265]. It lies for disturbance, obstruction, or other injuries, to offices, franchises, ferries, markets, tolls, or for not grinding at an ancient mill, etc. [11 East, 576, note]. * * *

"An action on the case is frequently given by the express provisions of some statute to a party aggrieved. * * *

"The declaration in an action on the case ought not in general to state the injury to have been committed *vi et armis*, nor should it conclude *contra pacem*; in which respects it principally differs from the declaration in trespass. In other points the form of the declaration depends on the particular circumstances on which the action is founded, and consequently there is greater variety in this than any other form of action. * * *."

1 Chitty on Pleading (11th Am. Ed.) 132-145.

Another very full and interesting catalogue of the cases where this form of action has been used may be found in Comyn's Digest, Tit. Actions on the Case.

EFFECT OF STATUTE ABOLISHING DISTINCTION BETWEEN TRESPASS AND CASE.
 "'The statute does away with the technical distinction between the two forms of action, but does not affect the substantial rights and liabilities of parties, so as to operate to give any other remedy for acts done than before existed.' We understand the statute to accomplish these objects and these only; to abolish the technical distinction between the two forms of action so that you may join counts in trespass with counts in case, and may call your action trespass or case—it is wholly immaterial which—and may sue out your writ in either form of action, and may then count in either trespass or case, or both, at your option. But your count, if in case, must contain all the elements of a good count in case, or if in trespass, must contain the elements of a count in trespass. The change goes only to the matter of the form of action, and does not change substantial right, and liabilities. Nor do we understand that this statute repeals that old and more than well settled principle, that in all actions the proofs must correspond with the allegations. Where a declaration is filed showing a good cause of action in either trespass or case, it is wholly immaterial whether you call your action trespass or case, but such facts must be alleged as show a legal cause of action in the one form or the other, and the facts that are alleged in the pleading must be supported by the proofs. If the declaration is in trespass *quare clausum fregit*, then there must be a possession in order to support it—either actual, or in case the premises are vacant and unoccupied, a constructive possession that follows ownership and title." St. Louis, Vandalia and Terre Haute R. R. Co. (1878) 3 Ill. App. 155, 160.

SECTION 4. TROVER.¹⁹ ✓

POOLE v. SYMONDS.

*Superior Court of Judicature of New Hampshire. 1818.**1 New Hampshire, 289.*

Trover for a mare. The cause was tried here at the last May term upon the general issue, when it appeared in evidence that the mare once belonged to one Ezra Flanders; that Ziba Huntington, a deputy sheriff, having an execution in his hands in favour of P. Noyes against Flanders for about 30 dollars debt and costs, on the 30th day of June, 1817, seized the mare upon the execution; that Flanders, being desirous to procure time to raise money and pay the execution, and thereby prevent the sale of the mare, requested Huntington to delay the sale, to which Huntington, who had been directed by Noyes to grant Flanders any indulgence not inconsistent with the safety of the debt, assented: Huntington took the mare into his possession, and delivered her for safe keeping to the plaintiff, who gave Huntington his promises in writing to return her on demand. Poole kept the mare until the 8th of August, 1817, when she was attached as the property of Flanders by the defendant, another deputy sheriff, on mesne process in favour of A. W. Morse against Flanders, and is now held by the defendant by virtue of that attachment. It did not appear that the mare was ever in possession of Flanders after Huntington seized her, nor that Huntington had ever advertised her for sale upon the execution.

19. DECLARATION IN TROVER.

For that whereas the said A B heretofore, to wit, on, etc., at, etc., was lawfully possessed, as of his own property, of certain goods and chattels, to wit, twenty tables, twenty chairs, etc. (specifying the goods, and describing each as generally as possible, omitting the quality, as 'mahogany, silver,' etc.), of great value, to wit, of the value of — l, of lawful money of Great Britain. And being so possessed thereof, he, the said A B, afterwards, to wit, on the day and year first above-mentioned, at, etc., aforesaid, casually lost the said goods and chattels out of his possession; and the same afterwards, to wit, on, etc., last aforesaid, at, etc., aforesaid, came to the possession of the said C. D by finding. Yet the said C D, well knowing the said goods and chattels to be the property of the said A B, and of right to belong and appertain to him, but contriving, and fraudulently intending, craftily and subtly to deceive and defraud the said A B in this behalf, hath not yet delivered the said goods and chattels, or any or either of them, or any part thereof, to the said A B, although often requested so to do, and hath hitherto wholly refused so to do, and afterwards, to wit, on, etc., aforesaid, at, etc., aforesaid converted and disposed of the said goods and chattels to his own use. To the damage, etc. 2 Chitty on Pleading, 323.

The jury returned a verdict for the plaintiff, and assessed the damages at 30 dollars.

William Smith for the defendant, moved the court to grant a new trial on the ground that the verdict was against law. He contended that the mare having been delivered to the plaintiff merely for safe keeping, he was to be considered as the mere servant of the sheriff without any legal interest in her, and therefore not entitled to maintain the action. *Ludden v. Leavit*, 9 Mass. Rep. 104; *Warren v. Leland*, 9 Mass. Rep. 265; *Commonwealth v. Morse*, 14 Mass. Rep. 217.

* * * * *

RICHARDSON, C. J.: On behalf of the defendant it is contended, that Poole has not a sufficient interest in the chat-tel in question to enable him to maintain this action, and several decisions in the supreme court of Massachusetts are relied upon as directly in point; and it is not to be doubted, that, if those decisions were correct, this objection must prevail. But the decisions in this state have been different. * * * No authority is cited by the court in Massachusetts in support of their decision; nor is it recollected that the determination here was supported by authorities. We have therefore felt it to be our duty to reconsider the question, and endeavour by a careful examination of the adjudged cases which bear upon the point to ascertain what the real law of the case is.

No man can maintain trespass, trover, or replevin for personal chattels without either an absolute or special property in the goods, and also possession.²⁰ But this possession may be either actual or constructive. Thus an executor is by construction of law possessed of the goods of the testator, and may maintain trover for them, although he has never been in the actual possession of them. So where one had wreck by prescription or grant, and another took it away, trespass or trover lay before seizure. And if A. in London gives J. S. his goods in York, and another takes them away before J. S. obtains actual possession, J. S. may

Trover is technically one of the forms of trespass on the case: *Hull v. Southworth* (1830) 5 Wend. (N. Y.) 265; *Harper v. Scott* (1896) 63 Ill. App. 401; *Smith v. Grove* (1848) 12 Mo. 51.

20. *Trover by a tenant in common.* Where three persons were joint finders of coins buried in the earth, each was entitled to possession of one-third of the coins, and since the whole was capable of ready division into three equal parts, one could maintain trover against another for the conversion of his share. *Weeks v. Hackett* (1908) 104 Me. 264.

maintain trespass or trover. So if the owner deliver his goods to a carrier or other bailee, although in such case another has the actual possession, still the owner has by construction of law a sufficient possession to maintain trover or trespass. This constructive possession is not founded on the mere right of property, but upon the right of possession. For if he, who has the absolute property, has not also the right of possession, he can have no constructive possession. Thus where the owner of goods let them for a year and they were taken away by a third person within the year, it has been held that he could maintain neither trespass nor trover.²¹ This constructive possession in one is by no means inconsistent with an actual possession in another. In many cases either he, who has the actual, or he, who has the constructive possession, may maintain trespass, trover, or replevin; but a judgment in favour of one will be a bar to an action in favour of the other. In some cases he who has only a special property, may have a constructive possession. Thus a factor, to whom goods have been consigned, but have never been received, has such a constructive possession, that he can maintain trover.

A special property in goods may in some cases be founded upon mere possession.²² Thus he, who finds goods, which have been lost, has a special property in them, because

21. "One who has merely a lien upon chattels, without any right to their possession, cannot maintain trover for their conversion. A landlord cannot maintain trover for the conversion of agricultural products, by reason of his statutory lien on them for rent."—*Dekle v. Calhoun* (1910) 60 Fla. 53. To the same effect see *Parker v. Lisbon First Nat. Bank* (1892) 3 N. D. 87; *Baker v. Seavey* (1895) 163 Mass. 522; *Owens v. Weedman* (1876) 82 Ill. 409.

22. The possession of personal property carries with it the presumption of title and enables the possessor to maintain trover against any one except the rightful owner: *Stevens v. Gordon* (1895) 87 Me. 564; *Duncan v. Spear* (1833) 11 Wend. (N. Y.) 54; *Harker v. Dement* (1850) 9 Gill. (Md.) 7; *Armory v. Delamirie* (1768) 1 Str. 505; *Magee v. Scott* (1851) 8 Cush. (Mass.) 148; *Burke v. Savage* (1866) 13 Allen (Mass.) 408; *Bartlett v. Hoyt* (1854) 29 N. H. 317; *Jones v. Sinclair* (1820) 2 N. H. 319; *Knapp v. Winchester* (1839) 11 Vt. 351; *Gunzburger v. Rosenthal* (1910) 226 Pa. St. 300.

"When it is said that the plaintiff in trover must have had, at the time of the conversion, the right to the property, and also a right of possession, nothing more can be intended than this: that the right of which he complains he has been deprived must have been either a right actually in possession or a right immediately to take possession; it is not enough that it be merely a right of action or a right to take possession at some future day. If, then, the plaintiff shows that property in his possession has been taken and converted, he shows prima facie his right to maintain the suit."—2 Cooley on Torts (3rd ed., 1906) 851.

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possession is evidence of title. Thus too, where goods were stolen from a stage coach, it was held, that they were well alleged in the indictment to be of the goods or chattels of the stage coachman, although he was the mere servant of the owner of the coach, and not answerable for the goods.

A special property may also be founded upon a responsibility for, or an interest in, the possession of chattels. Thus he, to whom goods are delivered merely to keep and redeliver upon request, has a special property in them. 21 H. 7. 14 Pl. 23, where it is said the point had often been decided. Jones on Bailment, 112.

That a sheriff, who has seized goods upon mesne process, or upon execution, an agister of cattle, a carrier, factor, consignee, pawnee, trustee, etc., have a special property, admits no doubt. 11 H. 4. 17 Pl. 39; 48 E. 3, 20 Pl. 3; 2 Saund. 47; 6 John. 195; 12 John. 403.

But a mere servant has not a special property in goods.
* * * Thus where a servant was employed in a shop merely to sell goods, he was held not to have a special property in them. Nor has a shepherd, who is employed to tend sheep, any property in the sheep. The reason is, because the law considers the goods and the sheep as much in the actual possession of the owner, as if the servant were not with them, and the servant is not responsible for them. If the goods or sheep are taken away by a stranger, it is no injury to the servant, because he has no interest in the possession. But if a servant undertakes specially to be accountable for goods committed to his custody, he at once exchanges the character of a mere servant for that of a bailee, and has a special property.

Thus it seems that any person, who has an absolute or a special property, in a personal chattel, and a right to reduce it to immediate possession, has in law such a possession as will enable him to maintain an action to vindicate his right of possession, and this is what the law denominates a constructive possession. And any individual, who has a particular interest in the possession of such chattel, whether such interest be founded upon the evidence of title which possession affords, as in the case of a finder of lost goods, or on a right to use of the chattel, as in the case of a hirer, etc., or on some responsibility for it, as in the case of sheriff, etc., has what the law denominates a

special property, and may maintain an action, whenever that special property is unlawfully invaded.²³

It now remains to compare the facts in the case before us with these principles. Huntington having seized the mare upon execution, delivered her to Poole and took his promise in writing to redeliver her on demand. Did this contract impose any responsibility upon Poole? That it did is not to be doubted. The extent of his responsibility is immaterial. It is enough that he was responsible for the safe-keeping and redelivery of the mare. This according to the principles to be deduced from the books gave him a sufficient interest in the possession to enable him to maintain this action. But it is said that Huntington had a special property in the mare; that two persons cannot have severally a special property in a chattel, and that therefore, Poole would not have a special property in her. It is for those who hold this doctrine to shew why two may not have severally, a special interest in a chattel as well as two may have severally one the general and the other a special property in it at the same time. The reason is certainly not very obvious. It is true that there are but two species of property in a chattel absolute and special; but it by no means follows from this that two cannot have severally a special property in it. There can be but one absolute owner of a chattel but it seems to us very clear that several persons may have severally a special interest in it. Thus in the present case, when Huntington had seized the mare he immediately became responsible both to the debtor and creditor, and thereby acquired a special property in her, and when he delivered her to Poole for safe-keeping, he did not part with his special property; but the moment that Poole became responsible for the safe-keeping and redelivery of her, he also acquired a special property in her, perfectly subordinate to and not at all inconsistent with, the special property of Huntington. If then the mare was unlawfully taken by the defendant, it was an injury both to Huntington and to Poole, and either may maintain an action; but a judgment in favour of one will be a good bar to an action by the other. Flanders had the general prop-

23. *Intent to convert, and knowledge of the plaintiff's rights, are immaterial in an action of trover. The essence of the action is the actual interference with dominion over the property: Pease v. Smith (1875) 61 N. Y. 477.*

erty, but not the right of possession; he could therefore maintain no action. Huntington's right of action was founded upon his special property and right of possession; Poole's, upon his special property and actual possession. If Poole is to be considered a mere servant, he must be held responsible to Huntington only as a servant. For it would be repugnant to every principle of justice to hold him responsible as a bailee while we allow him only the rights of a mere servant. But a mere servant is not responsible for goods forcibly taken from him, and if Poole is to be considered as employed in that character it would seem to be a good defence to any action Huntington may bring against him, that the mare was taken by force from him by the debtor or any other person without his fault. But this would undoubtedly be contrary to the understanding of the parties and might defeat the very object of the contract. It is therefore the opinion of the court that the plaintiff had a sufficient interest in the mare to enable him to maintain this action, and thus this objection cannot prevail.

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RILEY v. THE BOSTON WATER POWER COMPANY.

Supreme Judicial Court of Massachusetts. 1853.

11 Cushing, 11.

Trover for three hundred and ninety-four square of dirt, sand, and gravel. The defendants pleaded separately. At the trial in the court of common pleas, before WELLS, J. C., it appeared that the Water Power Company had contracted with the other defendants, Dalrymple and Lennon, to fill up a parcel of flats owned by the company, at a certain price per foot. In executing this contract, said Dalrymple and Lennon, purchased earth of different persons by the load, delivered at the filling ground; and there was evidence that some earth had been taken from the plaintiff's land without their consent, and sold by the trespassers to Dalrymple and Lennon at the ground. The defendants, Dalrymple and Lennon, requested the judge to instruct the

jury that the earth was real estate, and therefore this action could not be maintained. But the judge instructed them that as soon as the earth was unlawfully severed from the freehold by the persons who sold it to Dalrymple and Lennon, it became personal property in their hands, and that this action might be maintained. They also requested the judge to instruct the jury that by bringing an action of trover, the plaintiffs waived the trespass to the land, and thereby adopted the act, by which the property came into possession of the vendors; and therefore that the plaintiffs could not maintain an action against *bona fide* purchasers, not having notice of the trespass. But the judge instructed the jury that this action could be maintained against *bona fide* purchasers without notice of trespass.

The defendants further requested the judge to instruct the jury that, if the earth came to the possession of the defendants as *bona fide* purchasers, not having notice of the trespass, the plaintiffs must prove a demand on them before the commencement of the action and refusal to deliver. But the judge instructed them, that if, without knowing of the trespass, Dalrymple and Lennon purchased the earth *bona fide*, and paid a full equivalent for it to the trespassers, and directed them to tip it up on the filling ground, they would be liable in this action for value of earth at the filling ground, and no demand or refusal would be necessary. * * *

DEWEY, J.: It is certainly true that for an injury to his real estate, the party cannot maintain trover. That form of action is appropriate exclusively to the recovery of damages for the unlawful conversion of personal property. But this being granted, the further inquiry is, whether the three hundred and ninety-four squares of earth severed from the land of plaintiffs, and removed from the same and sold to the defendants, and used by them, was at the time of such purchase by the defendants, and use of the same, still a part of the realty, and retained unchanged its character as such, or whether by the act of separation in fact, and a removal of the earth to a distant place, it has not changed the character of the earth so removed to that of personal property. It seems to us that it is very well settled that whatever is severed from the land—as, in the familiar case of standing timber trees—if such trees being a part of the

realty, are cut down, they cease to be real estate and become personal. But this transmutation, while it changes the character of the property in this respect, does not change its ownership. It would not do so if cut down by the owner of land, and not any more so, by being cut down by a person entering unlawfully upon the land and making the severance. It is the actual severance that changes the property from real to personal, and that irrespective of its being done with, or without, the consent of the owner of the land. And in this respect we see no distinction between removing living trees, deriving their nourishment from the earth, and the removal of a portion of the earth itself.

It is next objected that the plaintiffs, by bringing this action of trover, and waiving their action of trespass *quare clausum* have adopted and sanctioned the original act of trespass, and therefore cannot maintain this action against one who purchased the earth *bona fide* of the trespassers. We do not perceive that any such waiver appears. It is true that the plaintiffs have not elected to institute an action of trespass *quare clausum* against the original wrongdoers. But as regards these defendants, who have the property of the plaintiffs without right, nothing is waived; they did not commit any trespass upon the plaintiffs' land, and no action could have been maintained against these defendants therefor. Their first connection with the plaintiffs' property was after it had been severed from the realty, and the only mode of enforcing a claim against them for the value of the same is by a personal action. If the plaintiffs have not this remedy, they are remediless as to any recovery against those who have received and converted to their own use their property. Take the case of valuable timber trees, cut down and carried away from the land, and sold by a mere trespasser. Is the owner of the same deprived of all remedy against any person who may have received these timber trees by purchase from the trespasser? He is so, unless trover will lie; for trespass *quare clausum* will not lie against such purchaser.

It is further contended that if the defendants were *bona fide* purchasers, and without notice of the trespass, the plaintiffs must prove a demand on the defendants and a refusal by them to deliver before the commencement of the action. The court ruled upon this point, if such purchase

was made in the manner above stated, yet if they received the earth from the trespassers by a purchase for their own use, and directed that the same be deposited on the filling ground, they would be liable without any such demand and refusal. This ruling may be fully supported upon the ground of a conversion in fact of the earth, and the impracticability of a redelivery of the earth after it had become thus intermingled with the soil of the land on which it was placed, and had become a part of the solid earth. Whenever there has been an actual conversion, or whenever the property has been thus appropriated, it is evidence of a conversion which supersedes the necessity of any demand. This view is to us a satisfactory answer to the objection here urged, that there was no proof of demand.

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*Exceptions overruled.*²⁴

24. Trover for stone, trees, grain or other property severed from the realty will not lie *against* a party who is in actual possession at the time of the severance, the reason being that it is impolitic to suffer him to be harassed with a separate action for each stone or tree or bushel of grain consumed on the premises instead of having the matter settled at once by an action to recover the possession: *Wright v. Guier* (1840) 9 Watts (Pa.) 172. Other cases base the rule on the ground that the chattel, immediately upon severance, becomes at once the property of the party in possession who severed it: *Branch v. Morrison* (1858) 6 Jones L. (N. C.) 16.

When a demand is necessary. "It is believed that all conversions may be divided into four distinct classes: 1. By a wrongful taking; 2. By an illegal assumption of ownership; 3. By an illegal user or misuser; and 4. By a wrongful detention. In the first three named classes, there is no necessity for a demand and refusal, as the evidence arising from the acts of the defendant, is sufficient to prove the conversion. In the latter class alone is such evidence [of demand and refusal] to be required, as the mere detention of a chattel furnishes no evidence of a disposition to convert it to the holder's own use, or divest the true owner of his property.' And to like effect are the cases of *Haas v. Taylor*, 80 Ala. 459, and *Bolling v. Kirby*, 90 Ala. 215; 24 Am. St. Rep. 789."—*Strauss v. Schwab* (1894) 104 Ala. 669. "Demand and refusal are evidence of conversion when the defendant is in such a condition, that he can deliver the property if he will. (*Johnson v. Howe*, 2 Gilm. 342; *Bruner v. Dyball*, 42 Ill. 35; *Hiort v. Bott*, L. R., 9 Exch. 86; *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767 and notes)."—*Union Stock Yards Co. v. Mallory, Son & Zimmerman Co.* (1895) 157 Ill. 554. "The sole object of a demand [is] to turn an otherwise lawful possession into an unlawful one, by reason of a refusal to comply with it, and thus to supply evidence of a conversion."—*Pease v. Smith* (1875) 61 N. Y. 477.

NEILER v. KELLEY. ✓

*Supreme Court of Pennsylvania. 1871.**69 Pennsylvania State, 403.*

SHARSWOOD, J.: This was an action of trover to recover damages for the conversion of certain railroad stocks and bonds alleged to have been held by the defendants below, as a pledge or collateral security for the payment of a debt or debts owing by the plaintiff to them.

The first assignment of error is, that the court below erred in overruling the demurrer to the declaration. This declaration was undoubtedly, as to part of it, defective in substance, and had that part of it alone been demurred to, it must either have been amended or judgment entered for the defendants for so much of the plaintiff's demand. It alleged the conversion of "70 shares of the Sunbury and Erie Railway Company of the par value of \$100 each; 43 and 75/100 shares of the Alton, Terre Haute and St. Louis Railroad Company of the par value of \$100 each." It was decided by this court in *Sewall v. The Lancaster Bank*, 17 S. & R. 285, that trover does not lie to recover damages for shares of bank stock, and the same principle, of course, applies to all other corporation stocks. Mr. Justice HUSTON said: "Though trover might lie for a certificate of stock as it does for a bond or a deed, yet it will not lie for 100 shares of bank stock any more than it would for a debt or a right of entry." A share of stock is an incorporeal intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive, in the mean time, such profits as may be made and declared in the shape of dividends. Trover can no more be maintained for a share of the capital stock of a corporation than it can for the interest of a partner in a commercial firm.²⁵ The two cases are precisely

25. An exception to this rule exists in cases where a corporation wrongfully refuses to make a transfer of its stock upon the books of the company upon due request of the assignee. This is held to be a conversion of the stock by the corporation and a suit in trover may be maintained against it: *Lewis v. Bidwell Electric Co.* (1908) 141 Ill. App. 33; *Cook on Corporations*, § 576; *Clark & Marshall on Corporations*, § 603.

analogous. But the document or writing which is the evidence of ownership is a tangible corporeal thing—the subject not only of property but of possession—the right to which is essential in trover. Thus a bond or promissory note may be the subject of the action but not the debt of which it is the evidence. The other things mentioned in the declaration do not fall within this objection. “Four bonds made by the Philadelphia & Erie Railroad Company, of \$1000 each; four bonds made by the Philadelphia & Erie Railroad Company guaranteed by the Pennsylvania Central Railroad Company, of \$1,000 each.”²⁶ * * *

26. *Money* which is earmarked or which is otherwise specifically capable of identification, may be the subject of an action of trover: *Weeks v. Hackett* (1908) 104 Me. 264; *Royce, Allen & Co. v. Oakes* (1897) 20 R. I. 252; *Iasigi v. Shea* (1889) 148 Mass. 538; *Kerwin v. Balhatchett* (1909) 147 Ill App. 561.

DAVIS v. HURT.

Supreme Court of Alabama. 1896.

114 Alabama, 146.

Upon the introduction of all the evidence, the court of its own motion, instructed the jury as follows: “If the jury believe from the evidence that the cotton in controversy was stored with the defendants as warehouseman for a reward, and the said defendants, upon demand, failed to deliver said cotton, or to account for its absence, then the defendants are liable in this action to the plaintiff for the value of the cotton and interest thereon from the time of such demand.” To the giving of this part of the court’s general charge the defendants duly excepted. * * *

* * * * *

BRICKELL, C. J.: Warehousemen are of the class of bailees bound to ordinary diligence, and, of consequence, liable only for losses occurring from the want of ordinary care. When, however, upon demand made, the bailee fails to deliver goods entrusted to his care, or does not account for the failure to make delivery, prima facie negligence will be imputed to him; and the burden of proving

loss without the want of ordinary care devolves upon him. *Seals v. Edmonson*, 71 Ala. 509; *Prince v. Ala. State Fair*, 106 Ala. 340; *Claflin v. Meyer*, 75 N. Y. 260; s. c. 31 Am. Rep. 467; *Boies v. H. & N. H. R. R. Co.*, 37 Conn. 272; s. c. 9 Am. Rep. 347. The rule is founded in necessity, and upon the presumption that a party who, from his situation, has peculiar, if not exclusive knowledge of facts, if they exist, is best able to prove them. If the bailee, to whose possession, control and care, goods are entrusted, will not account for the failure, or refusal to deliver them on demand of the bailor, the presumption is not violent that he has been wanting in diligence, or that he may have wrongfully converted, or may wrongfully detain them. Or if there be injury to, or loss of them during the bailment, it is but just, that he be required to show the circumstances, acquitting himself of the want of diligence it was his duty to bestow.

When the bailee fails to return the goods, on demand, the principal has an election of remedies; he may sue in assumpsit for a breach of contract, or in case for negligence, or if there has been a conversion of the goods, in trover for the conversion. Story on Bailments, secs. 191-269; *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492; s. c. 8 Am. Rep. 564; *Magnin v. Dinsmore*, 70 N. Y. 410; s. c. 26 Am. Rep. 608. The gist of the action of trover is *the conversion*; the right of property may reside in the plaintiff, entitling him to pursue other remedies, but trover cannot be pursued without evidence of a conversion of the goods. *Glaze v. McMillion*, 7 Port. 279; *Conner v. Allen*, 33 Ala. 516; *Bolling v. Kirby*, 90 Ala. 215. In *Connor v. Allen*, *supra*, it was said by RICE, C. J.: "Trover is one of the actions the boundaries of which are distinctly marked and carefully preserved by the Code. A *conversion* is now, as it has ever been, the *gist* of that action, and without proof of it, the plaintiff cannot recover, whatever else he may prove, or whatever may be his right of recovery in another form of action." And he adopts the definition or description of a conversion given by Mr. Greenleaf: "A conversion in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, *in exclusion or defiance* of the

plaintiff's right, or in withholding the possession from the plaintiff, under a claim of *title inconsistent with his own.*" 2 Greenl. Ev., sec. 642. In *Glaze v. McMillion, supra*, it was said: "It is believed that all conversions may be divided into four distinct classes: 1. By a wrongful taking. 2. By an illegal assumption of ownership. 3. By an illegal user or misuser. 4. By a wrongful detention." In *Bolling v. Kirby, supra*, there was a very full examination of the authorities, and discussion of the essential elements or facts which must concur to constitute conversion in the sense of the law of trover, by McCLELLAN, J.; and the result declared was, that "conversion upon which recovery in trover may be had, must be a positive, tortious act. Non-feasance or neglect of legal duty, mere failure to perform an act obligatory by contract, or by which property is lost to the owner will not support the action." The case is republished, with elaborate and instructive annotation by Mr. Freeman, 24 Am. St. Rep. 789-819. In *Ala. & Tenn. Rivers R. R. Co. v. Kidd*, 35 Ala. 209, it was held, that "trover will not lie for a bare nondelivery of goods by a warehouseman, unless they are in his possession, and he refused to deliver them on demand." In *Abraham & Bro. v. Nunn*, 42 Ala. 51, it was held, that trover would not lie against a warehouseman, for the conversion of goods taken from his possession by an armed force, without negligence or complicity on his part. In *Salt Springs Nat. Bank v. Wheeler, supra*, the defendant had received for acceptance certain bills of exchange, and at the demand of the person entrusting them to him, failed to return them, saying he could not find them, and might have torn them up with papers he considered of no value; it was held, he was not liable in trover, there being no evidence of a voluntary or intentional destruction or loss of the bills, though he was liable upon his implied promise to present the bills for acceptance, and if not accepted or paid, to give notice to the plaintiff.

Without pursuing further an examination of authorities, it may safely be said, that a mere failure by a bailee on demand made, to deliver goods which have been entrusted to him, is not a conversion which will support an action of trover, if he sets up no title hostile to or inconsistent with the title of the bailer, or has not appropriated them to his own use, or the use of a third person, or exercised over

them a dominion inconsistent with the bailment. All that can be fairly predicated of the facts found in the record, is the mere failure to deliver the cotton upon the demand of the plaintiff; possession of it not remaining with the defendant. There was no denial of the title of the plaintiff, nor a dominion exercised over the cotton inconsistent with the terms of the bailment, no evidence of a conversion of appropriation of it to their own use, or to the use of any third person by the defendants. The failure to deliver, unexplained, raises a presumption of negligence against them, and may involve them in a liability for a breach of the contract of bailment, or for negligence in the performance of the duty springing from the contract, but it is not the conversion, the positive, tortious act, indispensable to maintain trover. From this view, it results there was error in the instruction given voluntarily by the court below.

* * *

Let the judgment be reversed, and the cause remanded for further proceedings in conformity to this opinion.²⁷

27. *Converting to another's use.* "This court has held that in an action of trover, it is no defense that the defendant acted as the agent or servant of another who himself was a wrong-doer. *McPheters v. Page*, 83 Me. 234. And it is there held that if he has exercised a dominion over personal chattels in exclusion, or in defiance of, or inconsistent with, the owner's right, that in law is a conversion, whether it be for his own or for another person's use. *Kimball v. Billings*, 55 Me. 147, 151; *Freeman v. Underwood*, 66 Me. 229, 233. The same doctrine is laid down in other jurisdictions: *Williams v. Merle*, 11 Wend. 80; *Coles v. Clark*, 3 Cush. 399; *Gilmore v. Newton*, 9 Allen, 171; *Courtis v. Cane*, 32 Vt. 232. In some of these cases it has been held that an auctioneer, or broker, who sells property for one who has no title, and pays over to his employer the proceeds, with no knowledge of the defect of title or want of authority, is held to be liable for its conversion to the real owner. *Robinson v. Bird*, 158 Mass. 357, 360."—*Wing v. Milliken* (1898) 91 Me. 387.

BRADLEY v. DAVIS. ✓

Supreme Judicial Court of Maine. 1836.

14 Maine, 44.

This was an action of trespass for taking and carrying away a harness of the value of \$30, alleged to be the property of the plaintiff. The plaintiff introduced testimony to show, that the harness originally belonged to one Jame-

son, who sold it to the plaintiff; that the harness remained in the possession of Jameson, who was authorized by the plaintiff to sell it for him; that Jameson agreed with the defendant to sell him the harness on condition that he should pay ten dollars in cash on the Monday following, and secure the payment of the residue; that the defendant then took the harness, promising to return it the following Monday, if he did not before that time pay the money and give the security; and that neither was done; that the agent of the plaintiff did not sell the harness, or give the defendant any permission to keep it, unless payment was made and security given. He also proved, that the defendant afterwards sold the harness to another person. * * *

WESTON, C. J., who tried the action, instructed the jury, that trover would have been the more appropriate remedy; but that, if Jameson had made no sale and had reserved to the plaintiff, whom he represented, the possession on the Monday following his interview with the defendant, the plaintiff was entitled to immediate possession on Monday, and that the sale and transfer afterwards by the defendant, might be regarded as a trespass. The verdict was for the plaintiff, and was to be set aside if the jury were erroneously instructed.

* * * * *

WESTON, C. J.: The general property in the harness being in the plaintiff, drew after it such a constructive possession in him, as would enable him to maintain trespass against a stranger. The bailee being answerable to the general owner, may also bring trespass; and the right to maintain it attaches in him, who first brings the action. But a party shall not be charged as a trespasser for goods, which he received by delivery from the owner. Williams, in his notes to Saunders, 2 Saund., 47, note 1, says, that where the taking is lawful or excusable, trespass cannot be supported; but the owner must bring trover. And such was the opinion of the court in *Cooper v. Chitty*, 1 Burrow, 20, and in *Smith et al. v. Miller*, 1 T. R., 475. In *ex parte Chamberlain*, 1 Schoales & Lefroy, 320, Lord Chancellor REDESDALE says, that trespass cannot be brought for goods that were lawfully delivered.

If a party comes to the possession of goods lawfully, for any subsequent unlawful conversion of them, the appropriate remedy is trover. And this action will lie, where

trespass will, for the unlawful taking is a conversion. But Sergeant Williams, in the note before cited, says, that the converse of this proposition is not true.

It has been ingeniously argued by the counsel for the plaintiff, that any act is a trespass, in relation to the goods of another, for which there is no justification or excuse. But the remedy for every such act, is not trespass *vi et armis*. That would be confounding all distinction between trespass and trover. Every unlawful conversion, is without justification or excuse. If a man hires a horse to use two days, and he continues to use him the third day, it could hardly be contended that trespass would lie; although such use would be unlawful; and the owner would be entitled to the immediate possession. Yet being the general owner, and as such having a constructive possession, he might undoubtedly maintain trespass against a stranger, who should presume to use the horse on the third day. The ground of distinction is, that the taking by the stranger would be tortious from the first. If A permits his goods to remain with B for his own use, and B delivers them to C to carry to another place, trespass does not lie by A against C. 6 Comyn, Trespass D. The reason is, that B had the goods by delivery from the owner.

In the *Six Carpenters' Case*, 8 Coke, 146, it was resolved, that whoever abuses an authority or license derived from the law, becomes thereby a trespasser *ab initio* but that it is otherwise, where the license or authority is derived from a party. And Baron COMYN deduces from that case the general principle that, if a man has license or authority from the plaintiff himself, trespass does not lie against him, though he abuses his license by misfeasance. 6 Comyn, Trespass D.

The opinion of the court, is, that upon the facts in the case an action of trespass cannot be supported.

*Verdict set aside.*²⁸

28. "*Trover will lie for a temporary as well as for a permanent conversion. The return of the property, either before or after suit brought, may be shown in mitigation, and will often reduce the damages to a nominal sum. When it is apparent that the value of the chattel did not furnish the rule of damages, and that the judgment is for less than the value, there is no ground for regarding the recovery of judgment as a voluntary sale of the chattel by the plaintiff, nor its satisfaction as a compulsory purchase of the chattel by the defendant. In such a case, neither the rendition nor the satisfaction of the judgment transfers the property in the chattel to the*

defendant. *Barb v. Fish*, 8 Blackf. 841; *Sedgwick on Damages*, 5th ed., 575; *WILLES, J.*, in *Brinsmead v. Harrison*, L. R., 6 C. P. 584, p. 588;—see, also, *Lacon v. Barnard, Croke (Car.)* 35; *Field v. Jellicus*, 3 *Levinz*, 124.”—*Dearth v. Spencer* (1872) 52 N. H. 213.

SECTION 5. REPLEVIN.²⁹

WILLIAMSON v. RINGGOLD.

United States Circuit Court of the District of Columbia.
1830.

4 *Cranch*, 39.

Mr. Chief Justice CRANCH delivered the opinion of the court.

Mr. Justice THURSTON, dissenting.

This is a replevin for the plaintiff's goods, taken on a *feri facias*, against John Wells, Jr., at the suit of Thomas Carberry, issued out of this Court.

29. DECLARATION IN REPLEVIN. For that the said C D on the — day of — A. D. — in the parish of —, in the county of —, in a certain dwelling house there, took the goods and chattels, to wit, —, of him the said A B of great value, to wit, of the value of — l., and unjustly detained the same against sureties and pledges, until, etc., wherefore the said A B saith, that he is injured, and hath sustained damage to the value of — l., and therefore he brings his suit, etc. 2 *Chitty on Pleading*, 364.

Respecting this form Chitty says in the notes thereto: “The venue in this action is local, and the place is material and traversable.” “The action of replevin requires more certainty in the description of the place, where the distress was taken, than that of trespass, the place being material and traversable.” “This is the proper form, when the cattle have been replevied, Com. Dig. Pleader, 3 K. 10.” “It is not necessary in replevin in the *detinuit*, which is now the usual form of action, to state the price or value of the cattle or goods; see the reason, 2 *Saund.* 320, n. 1; *aliter*, if the declaration be in the *detinet*, Com. Dig. Pleader, 3 K. 10.”

The reason suggested in *Saunders*, *supra*, is “because if the plaintiff obtains a verdict, he is only entitled to damages for the wrongful taking and costs, but not to the value of the goods taken, as he is in trespass, for they were delivered to him when replevied.”

“In the action of replevin the question of value does not arise as an issue. The title and right of possession are the matters to be determined in the suit. The law will not, however, permit a person to take personal property from another by this process of replevin, until the officer serving the writ has taken a bond to the defendant, with sureties in double the value of the goods to be replevied, conditioned to pay the damages and costs,

Mr. Morfit, for the defendant, has moved the court for a return of the goods under the Act of Assembly of Maryland, 1875, ch. 80, sec. 14 (and also for a *venditioni exponas*,) because the goods were, as it is said, in the custody of the law, and therefore could not lawfully be replevied whether the plaintiff in replevin was, or was not, the owner of the goods at the time of the taking, and whether they were taken by the marshal out of the actual possession of the plaintiff in replevin, or out of the actual possession of Wells, the debtor in the execution.

It is understood to be admitted in argument, that the goods were the property of the plaintiff in replevin, at the time of the taking by the defendant, and that the defendant took them to satisfy the execution against Wells.

* * * * *

The motion for a return, upon the ground, that goods in the custody of the law are not to be replevied, is, in effect, a motion to quash the replevin; for if the return should be ordered, it must be without bond; and such an order would be of course, if the plaintiff in replevin were the debtor in the writ of *fieri facias*; for the law, in that respect, is well settled in this country as well as in England.

But it is not well settled, either there or here, that a man cannot maintain replevin for his goods taken out of his actual or constructive possession by an officer, to satisfy an execution against a third person. In some of the States it is well settled that he can. But in Maryland, the Court of Appeals has lately delivered a solemn opinion, that he

and also to return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment. The value of the goods makes no part of the declaration necessarily. It is only important as fixing the amount of the penal sum in the bond, which the officer is to require."—*Thomas v. Spofford* (1859) 46 Me. 408.

Replevin in the Detinuit and Detinet. "The writ of replevin is *quod cepit averia et injuste detinet contra vadios et plegios*; to which writ the sheriff returns *replegiari fecit*. There you go on in the replevin only for damages for the caption, and then in the count you recite the writ in the *detinuit*, and count in the *detinuit* for damages;—and though the writ be taken out in the *detinet*, yet when the sheriff hath returned *replegiari fecit* upon it, that return is a warrant to recite the writ in the *detinuit*; for if the writ was recited in the *detinet*, and the count was in the *detinuit*, it would be a variance for which the judgment may be arrested, or the defendant might have demurred. But where the sheriff does not replevy the beasts, there you must recite the writ in the *detinet*, and count in the *detinet* also, because the beasts are not delivered; and there you recover as well the value of the beasts in damages, as damages for the detention." Lord Chief Baron Gilbert on *The Law of Distress and Replevin*, 144.

cannot, in the case of *Cromwell v. Owens*, 7 Har. & Johns. 60, 61.

In England, it will be found that every case adduced in support of the rule, that replevin will not lie for goods in the custody of the law, are cases where the plaintiff in replevin was the debtor himself.

It is said to be a rule founded upon the policy of the law; and the reason given by Gilbert on Replevins, 161, in the very passage relied upon in support of the rule, is, that "it would be troubling the execution awarded, if the party on whom the money was to be levied should fetch back the goods by a replevin; and, therefore, they construe such endeavors to be a contempt of their jurisdiction; and upon that account commit the offender."

Goods seized and held by a trespasser, cannot, surely, be said to be in custody of the law, except as against the trespasser himself, when they are seized in execution. The policy of the law refuses him the right to question the validity of the judgment, or to deny his interest in the property, by any means that would defeat or delay the execution; but it does not refuse a third person the means of protecting his rights from illegal violation.

The general rule is, that replevin will lie wherever trespass will lie for taking the plaintiff's goods. There is, however, this difference between trespass and replevin, that trespass will lie upon possession alone; but replevin requires property in the plaintiff. All that is necessary to support the action, is property in the plaintiff, either general or special, and a wrongful taking from the plaintiff's possession, either actual or constructive.

The idea suggested by Blackstone, and repeated by several other elementary writers, that replevin will only lie for goods taken by distress, has no foundation.

I have not found it supported by a single adjudged case. On the contrary, the cases are abundant, from the time of the Year Books to the present moment, in which replevin has been supported for goods not taken by distress. Blackstone, (3 Com. 145, b.) says, "The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is, in the first place, the restitution of the goods themselves, so wrongfully taken, with damages for the loss sus-

tained by such unjust invasion; which is effected by action of replevin."

"This obtains only in one instance of an unlawful taking, that of a wrongful distress."

For this assertion, he cites no authority whatever; and it is believed none can be found.

Baron Gilbert, whose Treatise upon the Law of Replevins was published some years before Blackstone's Commentaries, defines the writ of replevin thus: "A replevin is a justicial writ to the sheriff, complaining of an unjust taking and detention of goods or chattels, commanding the sheriff to deliver back the same to the owner, upon security given to make out the injustice of such taking, or else to return the goods and chattels." Gilbert on Replevins, 58. Sellon, vol. 2, p. 153, following Blackstone, says, "Replevin is a remedy grounded upon a distress; for goods are only replevisable when they have been taken by way of distress. But he cites no authority, except Co. Lit. 145, which gives no countenance to such a doctrine. It only shows that replevin is the proper remedy in cases of distress for rent; but not that replevin will not lie for goods not distrained."

* * *

* * * * *

In an action of replevin, neither the writ nor the declaration says anything of the goods being taken as a distress. The injury complained of is, that the defendant took and unjustly detains the plaintiff's goods, not that he took them for any particular purpose.

In the case of *Shannon v. Shannon*, 1 Sch. & Lefroy, 327 Lord REDESDALE says, "Mr. Justice Blackstone's definition of the action of replevin is certainly too narrow. Many old authorities will be found (in the books) of replevin being brought where there was no distress." "It is an action founded on a taking, and the right which the party from whom the goods were taken has to have them restored to him, until the question of title to the goods is determined."

In the case of *Meany v. Head*, 1 Mason, 322, Mr. Justice STORY said: "At common law, a writ of replevin never lies, unless there has been a tortious taking, either originally or by construction of law, by some act which makes the party a trespasser *ab initio*."

* * * * *

It is admitted, on all hands, that "property in the defendant," or even "in a stranger," is a good plea.³⁰ It follows, therefore, that when the property is taken by the defendant, from the possession of the plaintiff, under the claim of title, replevin is the proper action to try that title. But the plaintiff in replevin cannot be supposed to know, before hand, what pretence the defendant may set up as an excuse for the taking; and whether that excuse be true or not cannot be known until the trial, so that it cannot be said, in any case where the taking of the plaintiff's goods has been from the possession of the plaintiff himself, that replevin will not lie. It is true, that in many such cases of taking, replevin cannot be maintained, because, upon the trial, it may turn out that the taking was lawful; but still, in those cases, replevin is the proper action to try the lawfulness of the taking, and the court will not quash the writ before that question is decided, unless the writ shall have been issued under such circumstances, as to be a contempt of the court. Gilbert on Replevins, 161.

This happens when the improper interference of one of the parties in the cause obstructs the execution of the judgment of the court. In such a case, it is considered as a constructive contempt.

The general rule, then, is clearly established, that replevin will lie for every wrongful taking of the plaintiff's goods out of his possession.

But there is said to be an exception to this general rule, and that is, where the goods are in the custody of the law.

* * * * *

In England, under the statute of Marlbridge, (53 H. 3, c. 21,) the application for a replevin is to be made to the sheriff himself, who has the goods in his possession, under the *fieri facias*, and who, if a third person claims the prop-

30. OUTSTANDING TITLE AS A DEFENSE. "To entitle a plaintiff to recover in an action of replevin, he must establish his right to the possession of the property replevied. This he may do by proving that he was in actual and undisputed possession when defendant took the property. If he had no such possession, he must prove title. If he bases his right to recover upon proof of title, defendant may defeat his recovery by proving title in a third person. *Nicholson v. Dyer*, 45 Mich. 610; *Upham v. Caldwell*, 100 Mich. 264. If, however, the property was taken from the actual and undisputed possession of plaintiff, defendant cannot defeat recovery by proving title in a third person. He must in that case prove that he himself has a title superior to that of the plaintiff. *Rose v. Eaton*, 77 Mich. 255; *Conely v. Dudley*, 111 Mich. 122; *Van Baalen v. Dean*, 27 Mich. 106."—*Sanford v. Millikin* (1906) 144 Mich. 311.

erty, has the power of summoning a jury of inquest to inquire to whom the property belongs. (Dalton, 146; Gilbert on Execution, 21, cited in *Farr v. Newman*, 4 T. R. 633.) If, upon that inquest, it be found for the third person, the sheriff will restore it to him, and be justified in his return of *nulla bona* upon the *feri facias*, so that the whole purpose of replevin is thereby answered. If the jury should find that it is the property of the debtor, he may go on to sell it, and the finding will mitigate damages, in an action of trespass, if the goods seized should happen not to be the defendant's. *Farr v. Newman*, 4 T. R. 633.

But, in this county, it has not been the practice of the marshal to summon a jury to try the question of property; if he has any doubt, he may require a bond of indemnity from the plaintiff. If the marshal here has no power to summon a jury to inquire of the property, justice seems to require that the owner should have his writ of replevin, if there be no positive rule of law to the contrary.

* * * * *

The general rule, as before observed, is, that replevin will lie wherever trespass will lie for taking the plaintiff's goods.

The facts necessary to maintain the suit, are, property in the plaintiff, either general or special, and a wrongful taking of the goods out of the plaintiff's possession, either actual or constructive. The possession must be such as would maintain trespass. If the original taking be lawful, or if the possession never was in the plaintiff, an unjust detention alone will not maintain replevin, (*Gardner v. Campbell*, 15 Johns. 401; 2 Wheat. Selwyn, 896,) unless attended by some act which would make the defendant a trespasser *ab initio*. *Meany v. Head*, 1 Mason, 322; 4 Bac. Ab. Replevin, F.

I am aware of the cases of *Badger v. Phinney*, 15 Mass. Rep. 359, and *Baker v. Fales*, 16 Id. 147, but am not satisfied that they can be supported upon principles of common law, however correct they may be, under the statutes of Massachusetts.

* * * * *

Being of opinion that it is a general principle of the common law, that replevin can be maintained in all cases where the plaintiff's goods have been wrongfully taken from his possession, and that the exception of goods taken

in execution applies only to the debtor himself, I think that the motion to quash the replevin, on the ground that the goods were in the custody of the law when the replevin was served, and also the motion for a *venditioni exponas*, ought to be overruled.

BAKER v. FALES.

Supreme Judicial Court of Massachusetts. 1819.

16 Massachusetts, 146.

This was a writ of replevin, dated April 9th, 1819, in which the plaintiffs, as "deacons of the first church in Dedham, which church is connected and associated with the first parish in said Dedham in public religious worship," allege the taking and unlawful detaining of certain property belonging to them in their said capacity, by the defendant on the day of the purchase of their writ.

The defendant pleads in abatement of the writ, that on the 14th of November, 1818, at, etc., he also was a deacon of the same first church, and that the goods mentioned in the plaintiffs' writ, came lawfully into his possession as such deacon, and as the proper person to have, possess, and keep the same; and that the same goods were never, until after the service of the writ, in the possession of the plaintiffs; and this, etc.; wherefore he prays judgment of the writ, that the same may be quashed, and for his costs, and for a return.

To this plea the plaintiffs demur generally, and the defendant joins in the demurrer.

PUTNAM, J.: The plaintiffs sue in their capacity of deacons of a church, to recover specifically the goods which belong, as they offer to prove, to the church; and which the defendant has taken and unjustly detained.

* * * * *

The objection most insisted on is, that there has not been a tortious taking; that the goods came into the defendant's possession as deacon of the church, and as the proper person to hold them; and as there has been at most but a

wrongful detention, that the writ of replevin should be quashed.

But what is to be considered as an unlawful taking? Is it confined to a case of taking *vi et armis*? Or may one be considered constructively taking goods, who came lawfully into possession, but keeps them from the owner against right?

Now, I hold that he who will not redeliver goods to the owner, but abuses the trust, is answerable either in replevin for the goods specifically, or in trover for damages; and that it is at the election of the owner, and not of the tort-feasor, which of these remedies shall be applied. For otherwise it would be in the power of one to take advantage of his own wrong; and the party injured might never recover a complete satisfaction for the injury. It has been decided accordingly, when the eminent Chief Justice PARSONS presided in this court and gave the opinion, that, as a general principle, the owner of a chattel may take it by replevin from a person, *whose possession is unlawful*, unless it is in the custody of the law, or unless it has been taken by replevin from him by the party in possession. Conformably to this, the same great judge afterwards held that the consignor might maintain trover or replevin against a shipmaster, who stopped short of the port of delivery without reason, and refused to proceed thither. That was a case where the goods came lawfully into the hands of the defendant, by delivery for a special purpose; and he neglecting to perform the trust, the owner was permitted to recover the goods specifically, or the damages, at his election.

* * * * *

The cases, which have been cited by the counsel for the defendant from the decisions of the Supreme Court of New York, have, from the unfeigned respect we feel for that tribunal, been examined with attention. In the first [*Pangburn v. Patridge*, 7 Johns. 140], it was decided that replevin was not to be confined to cases of distress; but would lie for *any* unlawful taking. * * * The next case [*Hopkins v. Hopkins*, 10 Johns. 369] was replevin for taking the plaintiff's sheep. The defendant justified the taking them damage feasant. The plaintiff replied that the defendant abused the distress afterwards, so as to make him a trespasser *ab initio*. The abuse consisted in impounding

the sheep, before the damages had been ascertained by the fence-viewers; which was required by the statute of New York, and had been so decided in the case of *Sackrider v. M'Donald*, 10 Johns. 253. And the court were clearly for the plaintiff. Chief Justice KENT, in delivering the opinion, stated that the action of replevin is grounded on a tortious taking (which as a general remark is certainly true), and that where a defendant in replevin has abused a license of the law, he shall be considered a trespasser *ab initio*, as he would be if the action were trespass. And the chief justice proceeds to cite Fitz. N. B. 69, and 8 Co. 146, where a party is not to be adjudged a trespasser *ab initio*, but is liable in replevin merely for the unlawful detention. "As if a man take cattle damage feasant, and the other tender sufficient amends, and he refuses to deliver them back; if he sue replevin, he shall recover damages only for the detention, and not for the taking, for that was lawful."

It has been contended for the defendant, that in the case last cited, the defendant became a trespasser *ab initio*, because he abused a license of the law; and so the original taking was to be considered as tortious; and thus this case is to be reconciled to the general doctrine requiring a tortious taking to enable the plaintiff to maintain replevin.

* * * * *

Now, I do not perceive how the distinction between the abuse of the license of the law, and the license of the party, will be very material. The rule is very well stated in 12 Edw. 4, 8 pl. 20, "Where a man does a thing by the authority of the law, and afterwards misdemeans himself, *his first act* shall not be tortious." In a subsequent case, 21 Edw. 4, 19, Pigot (who was a counsellor) contended that there was no difference between the license of the law and of the party; but the court adhered to it.

To apply the rule to the case at bar; the goods came to the defendant's hands by the license of the law, or of the party. Suppose by the license of the law; then if, by detaining them unjustly, he becomes a trespasser *ab initio*, the plaintiff is to maintain his replevin on the ground of an original tortious taking. But suppose they came to the hands of the defendant by the license of the church, which in effect is the party, then he is to be punished only so far as he has abused the authority. From that time only he be-

comes a trespasser, not from the beginning; but, as Lord COKE expresses it in the case above cited, "he shall be punished *for his abuse* of it." The distinction, therefore, goes only to the damages to be recovered.

* * * * *

It is said in Com. Dig. Pleader 3, K. 12, that the defendant may plead bailment to him by the plaintiff, for which detinue lies, and not replevin. The chief baron cites no authority for this. His own is of great weight. We remark, however, that detinue is an action which has fallen into disuse. In this state it is never brought. The mischiefs and perjuries, arising from the wager of law allowed in that action, were among the many strong reasons for substituting the action of trover. And besides, the remedy was incomplete; for while it purported to permit the plaintiffs to recover his goods specifically, the very object of the suit was defeated by the conditional judgment; which, at the election of the defendant, allowed him to keep the goods, if he chose to pay the price.

* * * * *

The argument from inconvenience has been much pressed upon this occasion. It has been argued that, under color of a replevin, every man may have his house stripped of his family pictures, and be completely robbed of his goods under color of law.

That would indeed be a great abuse of legal process, requiring exemplary punishment. But what good thing is not liable to be abused? On the other hand, the inconvenience would be intolerable, if the action would not lie to recover specifically the goods, which should be unjustly withheld. Suppose that one should send his ship to be repaired; if the shipwright should afterwards think it better for him to keep her, or to send her freighting on his own account, must the owner submit to the change of property against his consent? Shall he be obliged to accept a judgment for the damages, which may never be paid? And so of a thousand things, the value of which cannot be fully compensated by money. Take, for example, a chronometer or other instrument of rare and curious workmanship, or a picture, or a manuscript, unlawfully detained.

But the argument from inconvenience, which had so great an influence upon the Lord REDESDALE, has no application here. If, indeed, a replevin was a judicial writ, or grant-

able only at the discretion of the court, it might be necessary to consider that question. But as it is issued, like all other original writs, upon the demand of the plaintiff, it is not in the power of the court to prevent any of the inconveniences, which are anticipated from the abuse of the process. All that can be done is to punish such abuse, when it occurs, as is done in other like cases. A plaintiff in replevin can always set forth a sufficient cause of action; and upon giving the security required by law, he has a right to have the goods delivered to him. If the writ were abated, the defendant would have the same difficulty in regaining his goods, as he would have if he defeated the plaintiff upon the merits.

The statute of 1789, c. 25, seems to proceed upon these principles, authorizing a replevin for goods taken, detained, or attached; adopting the common law, where they are taken or detained; and extending the remedy, where they are attached.

Upon the whole matter, we are satisfied that the plaintiffs may well maintain this action, and that the defendant must therefore answer over.

*Respondeas ouster awarded.*⁸¹

31. *Largely a Statutory Action.* "The action of replevin is not, strictly speaking, a common-law action, but mainly, if not entirely, of statutory origin and of a peculiar nature. See 3 Blackstone's Com., p. 146-151."—Corbett v. Pond (1897) 10 App. Cas. D. C. 17.

Replevin as an action in rem. "The action of replevin is regulated by statute, Gen. Laws R. I. cap. 272. * * * These provisions clearly show that the action of replevin in this State is so far a proceeding *in rem* that unless the *res* has actually been taken possession of by the officer there is no case before the court, and hence nothing to try. * * * There is no provision which allows the jury to find for the plaintiff in the value of the goods replevied. They can only find damages for the unlawful taking and detention. * * * But the plaintiff's counsel contends that the action will lie simply on a writ of summons and without any taking of the property by the sheriff as commanded. In support of this very novel contention in this State he cites a number of authorities from other States, in several of which such a proceeding has been sustained. But as the action is everywhere regulated by statute, and as the statutes of no two States, so far as we have examined them, are alike, but very little aid can be obtained from the decisions thereunder. For instance, take the statute of Michigan on replevin. It provides, among other things, that: 'If the goods and chattels specified in any writ of replevin shall not be found or shall not be delivered to the plaintiff, he may proceed in the action for the recovery of the same or the value thereof.' Comp. Laws of Michigan, 1897 (10,660). [Other statutes similar to that of Michigan are cited: Wis. Stat., 1898, § 2859; Kan. Rev. 1901, § 4619; Laws of Del., Rev. Code, 1852, as amended, 1893, pp. 793-5; Ark. Stat., Rev. 1894, § 6397; Pomeroy v. Trimper, 8 Allen (Mass.) 398]—Warren v. Leiter (1902) 24 R. I. 36.

"*Replevin is a purely possessory remedy.* It contemplates the situation where property being in the peaceful possession of A is seized by B. The

original possession of A justifies the presumption, ordinarily indulged by the law in favor of possession, that A is the owner, or at least is entitled as against a trespasser to be treated as such. The law therefore gives the writ of replevin to A, by which he recovers the property pending the settlement of the controverted right.

"Now when replevin is extended beyond these limits and is used to recover property wrongfully detained, it at once becomes an anomalous remedy and goes against the presumption of law that one having lawful possession has also *prima facie* title. Still, in a number of American jurisdictions this is permitted, either as a result of judicial decision or by statute. * * * In most jurisdictions such extension of the remedy has been accomplished by statute.

"It will be observed that the adoption of the doctrine that replevin will lie for any unlawful detention operates at once to destroy its distinctive character as a possessory action. The remedy thereby comes to be founded on property as well as possession. The issue of ownership in the defendant is therefore no longer a collateral issue and is available as matter of defense at the trial of the replevin suit. It results that though the plea *non cepit* admits property in the plaintiff, such plea may be joined with a special plea of property in the defendant or other person." 3 Street on Foundations of Legal Liability, 220.

MILLER v. ADSIT.

Court for the Correction of Errors of New York. 1836.

16 Wendell, 335.

Error from the Supreme Court. Miller brought an action of replevin against Adsit in the Rensselaer common pleas, in September, 1828, and declared for the taking and detention of two horses. The defendant pleaded. * * * 3. That the property in the horses was in Jacob Coon, and that they were levied upon, on the 2nd June, 1828, by the defendant as a constable by virtue of an execution issued on a justice's judgment rendered on the the 16th May, 1828, in favor of one E. R. Ball against Jacob Coon for fifty-one dollars and seventeen cents. To * * * the third plea [plaintiff] put in two replications: * * * 2. That on the 9th May, 1828, one Eliza Coon recovered a judgment in a justice's court by confession against Jacob Coon for two hundred and one dollars and twelve cents, upon which an execution was issued and delivered to one Solyman Coon, a constable, who, on the same ninth day of May, levied upon the horses in question, and advertised the same to be sold at public vendue on the twelfth day of June then next; that the plaintiff in this suit became the receiptor of the said property, and agreed to deliver the same to the

constable, Solyman Coon, on the twelfth day of June, or whenever same should be demanded, and then and there took the horses into his custody and possession, and retained the same in his possession until the tenth day of June, when they were seized and taken away by the defendant. To * * * the second replication * * * [defendant] rejoined that he did not seize and take the horses from the possession of the plaintiff, concluding to the country. On trial in the common pleas the existence of the judgments and executions as set forth in the pleadings was admitted, and it was also admitted that, on the thirteenth day of May, Solyman Coon levied upon the horses in question by virtue of the execution in favor of Eliza Coon, and took from the plaintiff in this cause an instrument in writing whereby the plaintiff acknowledged to have received the horses from Solyman Coon, and agreed to redeliver them to him on the twenty-eighth day of June, or pay the debt and costs demandable under the execution in favor of Eliza Coon. It was proved by the testimony of Jacob Coon, that the plaintiff in this cause, Miller, after having receipted the property, requested him to take the horses and keep them, using them enough to pay for their pasturage, as he, the plaintiff, had no pasture for them; and that the plaintiff had the right to take them from him whenever he pleased. That he accordingly took the horses, and they were in his employment when they were taken by the defendant on the third day of June. At the time of the taking, the plaintiff was not present; he resided on an adjoining farm; and the defendant was informed of the previous levy, and of the circumstances under which the property was situated. The defendant moved for a nonsuit on the ground that the plaintiff being a bare receptor of the property in question, had no such interest in it as would enable him to maintain the action of replevin. The common pleas granted the nonsuit. * * * The plaintiff sued out a writ of error, removing the record into the supreme court, where the following judgment was rendered: the judgment of the common pleas to be reversed, and *venire de novo* to issue in the cause, the costs to abide the event thereof, unless the defendant before the next term of the common pleas remit to the plaintiff so much of the amount found by the jury as to reduce the same to the sum of fifty-one dollars and seventeen cents with interest of that sum and constable's

fees on the execution in favor of Ball; and in case he so remit, then that the judgment be affirmed without costs. The defendant entered a remittitur accordingly, and took judgment for the balance. Whereupon the plaintiff removed the record into this court by writ of error.

* * * * *

By the CHANCELLOR. In this case, the plaintiff brought an action of replevin for a span of horses which belonged to Jacob Coon, and which were taken by the defendant from the actual possession of Coon, on an execution against him. The general question, whether the receiptor of goods, taken in execution, has such a special property in the goods as will enable him to maintain an action of replevin, or any other action in his own name, against a mere wrongdoer, who takes the goods out of his actual possession, was the one principally discussed upon the argument. I have no doubt whatever as to the right of the receiptor to bring an action of trespass in such a case in his own name, in which he may recover whatever damages he will be liable for to the officer to whom the receipt is given. Any possession, even without right, is sufficient to maintain an action of trespass against a mere stranger who, without any pretence of claim from or under the real owner, violates such possession; but the law appears to be settled, that to maintain replevin, the plaintiff must not only have the possession, but he must also have either a general or special property in the goods replevied. Hence, it has always been held that a plea of property in a stranger was a good plea, either in abatement or in bar, in an action of replevin. It was so decided by the supreme court of this state in the case of *Harrison v. McIntosh*, 1 Johns. R. 384, and such has been the established rule of law upon the subject for more than a century. See *Bacon's Case*, Cro. Eliz. 475; *Presgrave v. Sanders*, 1 Salk. Rep. 5; Com. Dig. Tit. Pleader, 3 K. 11, 12. Either a general or a special property in the goods is therefore necessary to entitle the party from whom they are taken to maintain replevin, although the bare possession is sufficient to maintain trespass for a violation of such possession. Judges have sometimes said that replevin will lie in all cases where an action of trespass could be brought for taking the goods. Those expressions, however, will upon examination be found to relate to the manner of taking which is necessary to sustain the action,

and not the ownership, which is required in the one case but not in the other. Previous to the revised statutes, therefor, the possession and tortious taking of the property, must have been such that an action of trespass could have been maintained against the defendant; and in addition to that, the plaintiff must also have had such a general or special property in the goods as would have entitled him to recover in trover for a conversion of such goods by the defendant. Either a general or a special property in goods, however, is sufficient to maintain an action of replevin against a wrong-doer if the goods are taken from the possession of the plaintiff.

Whether the receiptor of goods taken on execution, or any other bailee or mere depositary of goods, who has no lien thereon or any other interest therein than what arises from his liability to the officer or owner for the safe keeping and return of the goods, has such an interest therein as will entitle him to maintain either replevin or trover for the taking of the goods from his possession by a mere stranger, claiming no right under the general owner or the officer, is a question which does not appear to be very well settled in this country. The cases cited upon the argument show that different opinions prevail in the states of New Hampshire, Massachusetts, Pennsylvania, and New York on this subject; and the same difference of opinion appears to have existed in England at a former period. The case referred to by Sir William Jones from the year books, 21 Hen. 7. 14 b., appears to be one in which an action of replevin was sustained by such a bailee, for the taking of the goods out of his possession; but Mr. Justice STORY in his learned commentary upon the law of bailments supposes that the case in the year books was either misreported, or that it was overruled by the case of *Hartop v. Hoare*, 3 Atk. Rep. 39, and other English cases. He therefore arrives at the conclusion that the doctrine generally maintained by the better authorities is that a depositary has no property whatever in the deposit, but a custody only. Story on Bail. 72. Sec. 93. * * * I am inclined to think, however, * * * that the receiptor who has become answerable to the officer for the absolute return of the goods seized on execution, has such an interest therein as to enable him to protect his possession against a mere wrong-doer, by any of the usual remedies allowed to

a possessor of goods having a special property therein, so long as the receiptor actually retains that possession himself. But if he suffers the goods to remain in the hands of the general owner, or redelivers them to him to be kept, he cannot resort to an action of replevin, which requires possession as well as property to sustain it. I can imagine a case in which two distinct parties may each have a special interest in goods which belong to a third person as the general owner. Where the actual possession, however, is in such general owner, I cannot conceive of a case in which the law would give a constructive possession to two other distinct parties at the same instant, so as to authorize both to bring separate actions of replevin at the same time, for a violation of their several possessions. If the actual possession is in the judgment debtor, the general owner, the constructive possession at the time of taking the goods from him must be either in the receiptor or in the officer, but cannot be separately in each. * * *

As property seized upon execution is in the custody of the law until it is sold, or the execution is otherwise satisfied, the officer cannot legally do any act which shall have the effect to divest him of the constructive possession thereof and the right to reduce it into his immediate possession, so that if a second execution is put into his hands no new levy is necessary to give the creditor an immediate lien upon the property. In the present case, therefore, as the second execution was levied upon the property in the actual possession of Jacob Coon, the general owner, and the constructive possession was in the officer who had levied upon it by virtue of the first execution, Miller, the receiptor, had not such a possession, coupled with his special interest in the preservation of the property, as to authorize him to bring an action of replevin, and thus to defeat the lien of the last execution. If he sustained any injury by the second levy, or was likely to sustain any on account of his liability upon the receipt, he might either have brought an action of replevin in the name of the officer who had the constructive possession, or an action upon the case in his own name. So that in one way or the other, his rights would have been fully protected without defeating the rights of the junior creditor as to the surplus, if any there should be. * * *

* * * * *

* * * I think the plaintiff in the present case was properly nonsuited upon the trial; and that the judgment should therefore be affirmed.

By Senator MAISON. * * *

* * * * *

It was objected on the argument, that the horses being taken from Jacob Coon's possession, they were not taken from the possession of the receptor, and so the receptor could not maintain replevin. The evidence is, that Coon kept the horses for the receptor, who had a right to take them away when he pleased. They were constructively in possession of the receptor, and such constructive possession is sufficient to maintain trespass or replevin. *Burrows v. Stoddard*, 3 Conn. Rep. 160. *Clark v. Skinner*, 20 Johns. R. 469. Notwithstanding the horses were in the possession of Coon, they were still in the custody of the law, *Hartwell v. Bissel*, 17 Johns. R. 128; they were in the legal possession of the receptor. * * *

* * * * *

In the affirmative—the President of the Senate, and Senators Armstrong, J. Beardsley, Beckwith, Downing, Fox, Griffin, J. P. Jones, Lacey, Lawyer, Loomis, Lounsberry, Mack, Maison, Powers, Spraker.—16.

In the negative—The Chancellor, and Senators Hunter, Gansevoort, Tracy, Wager, Willes.—6.³²

32. RIGHT NEED NOT BE GOOD AGAINST THE WORLD. "To entitle him [the plaintiff] to the possession, it is not necessary that he should be the owner, or that he should be entitled to the possession as against all others. It is sufficient if he is entitled to the possession as against the person who takes it from him": *Sprague v. Clark* (1868) 41 Vt. 10.

The right to possession must be a *legal right*; an equitable right is not sufficient: *Fisher v. Alsten* (1904) 186 Mass. 549.

"Replevin lies for such a taking as will sustain an action of trespass *de bonis asportatis*": *Chapman v. Andrews* (1829) 3 Wend. (N. Y.) 242.

REPLEVIN A POSSESSORY ACTION.

"That replevin is a remedy designed to protect the right of possession merely is obvious from the fact that a possessory right only is sufficient to maintain it. Thus if the beasts of another are agisting upon my land and manuring it, I shall have replevin against a stranger who takes them. Hence also it follows that in any case the bailee may sue in replevin against one who seizes the chattels out of his possession.

"It was, indeed, customary in ancient times to say that it is necessary for the plaintiff in the replevin to have property in the goods sought to be replevied, and cases where the bailee maintained replevin were explained by saying that the bailee has a special property which will sustain the writ. But in truth, what the older writers call a special property is nothing more than the right of possession, and this is all that is necessary to support replevin when the property has been in the first instance wrongfully taken from the person suing. Accordingly, 'ownership cannot be tried on this writ.' The

replevin writ in terms commands the sheriff to replevy the goods of the plaintiff which have been taken and unlawfully detained by the defendant. It confers no authority on the sheriff to deliver to the plaintiff any goods belonging to the defendant. Neither does it confer on the sheriff any jurisdiction to try a controverted question of title. Hence when the defendant asserted ownership of the property which was sought to be replevied, the sheriff's power terminated and the replevin was thereby blocked. * * *

"The recognition of the general principle that the defendant could defeat the action merely by claiming ownership and without proof certainly rendered the action of replevin a little hazardous. In the latter part of the fourteenth century, the difficulty was largely removed by the invention of the writ for the trial of property (*de proprietate probanda*). This writ authorized the immediate trial of the right of property, and the fate of the replevin suit was made to depend upon the result. * * *

"The writ *de proprietate*, it will be observed, could be had only at the instance of one named as a party in the writ of replevin. Consequently if the beasts of a stranger are taken in replevin, he cannot have a writ for the trial of the property." 3 Street on Foundations of Legal Liability, 213.

Replevin does not lie to determine an adverse claim to property in plaintiff's possession. "The action of replevin (under our statute at least) is peculiarly a possessory action; and its primary object is to enable the plaintiff to obtain the actual possession of property wrongfully detained from him by the defendant at the time the action is brought. * * * Why bring the action to obtain the possession, if the plaintiff has it already without suit? A mere claim to the right of possession by another can not give the right to maintain replevin, while the plaintiff has the possession in fact. An action of replevin is not in the nature of a bill *quia timet*."—Hickey v. Hinsdale (1863) 12 Mich. 99.

BOTH PARTIES ACTORS IN REPLEVIN.

"In this action of replevin, differently from all other actions at common law, both parties are actors. Both are plaintiffs and both are defendants. This is the logical result of the fact that under the peculiar operation of this action there is practically a recovery by the original plaintiff, when he files his declaration, affidavit and undertaking, as required by the statute, and thereupon sues out his writ. For thereafter it is incumbent upon him only to prove his title to the property in controversy, and upon proof of such title satisfactory to the jury, he recovers only a nominal judgment, that is, for costs and usually nominal damages, for in the possession of the property he has already the substantial fruits of judgment; while upon the defendant it is incumbent not only to overcome the plaintiff's claim of title, but likewise to prove the value of the property and his own right to have it returned to him; and the judgment, if he succeeds, is not such a judgment as would be rendered in other cases—a judgment merely that he go without day and recover his costs—but a substantial judgment for the recovery of the property, for the value of it if it has been eloiigned, and for damages for the unlawful seizure. In fact, it may be said that ordinarily in the action of replevin the only substantial judgment is that which is authorized to be rendered for the defendant in the event that he prevails in the suit.

"It is very evident, therefore, that in this suit the defendant is greatly more the actor than is the original plaintiff. * * * It is not competent for the plaintiff, in an action of replevin, as it is in other actions, to discontinue or dismiss his suit or voluntarily to withdraw from it, without the consent of the defendant, after the property has been delivered to him under the writ, unless he returns the property taken or makes good to the defendant the loss sustained by him by the taking. And this is for the reason that, after the property has been seized and delivered to the plaintiff, the defendant becomes the virtual plaintiff in the case. This is elementary law; and it is the natural dictate of justice. Jones v. Concannon, 3 T. R. 661; Barrett v. Forrester, 1 Johns. Cases, 247."—Orbett v. Pond (1897) 10 App. Cas. D. C. 17.

SECTION 6. DETINUE.

DAME v. DAME.

*Supreme Judicial Court of New Hampshire. 1861.**43 New Hampshire, 37.*

This was an action of detinue, brought to recover a house and barn alleged to be the property of the plaintiff, and situated on the land of the defendant, in Farmington, in said county, all of which is fully set forth in the plaintiff's declaration, which is as follows:

"In a plea of detinue for that whereas the plaintiff heretofore, to wit, on the first day of July, 1856, at Farmington aforesaid, was lawfully possessed of a certain house and a certain barn, both situated on the land of the said Daniel Dame, being the house built by the plaintiff in the year 1842, said house being about thirty-six feet long and about twenty-six feet wide, and of the value of \$200, situated between the house of Eleazer Rand and the house now owned by Benjamin Chesley, on the left hand side of the road leading from the Bay road, so called, to the Ten Rod road, so called, as one goes toward the Ten Rod road, as of his own house and barn, and being so possessed, the said plaintiff afterwards, to wit, on the third day of July, 1856, casually lost the same out of his possession, which thereafterward, to wit, on the same day, came into the hands and possession of the said Daniel Dame, by finding; and the plaintiff further saith, that although the said Daniel Dame well knew that the said house and barn were the proper house and barn of the plaintiff, and although requested by the said plaintiff, to wit, at said Farmington, on the nineteenth day of May, 1860, to deliver the same to the plaintiff, yet the said Daniel Dame hath not delivered up the said house and barn to the plaintiff, but wholly refuses so to do, and still unlawfully detains the same."

To this declaration the defendant filed a general demurrer, and the plaintiff joined in demurrer; and the question of law was reserved.

SARGENT, J.: The only question here raised is whether in this State an action of detinue can be maintained. It is

claimed by the defendant that this form of action was never introduced into this State, or if it ever has been used or authorized here, that it has from recent entire disuse become obsolete so that it can not now be maintained.

This action was early held to be an appropriate remedy in a certain class of cases. It would seem that the original distinction between replevin and detinue was very similar to that between trespass and trover. Trespass *de bonis asportatis* was brought, not to recover the identical thing taken, but damages for the illegal taking and loss of the same, when such taking was unjust and unlawful, while trover was brought for the unjust detention and conversion of property where the original taking was lawful and proper.

So replevin was originally brought to recover the possession of a chattel *in specie* when the original taking was wrongful, and detinue to recover the article *in specie* when the original taking was lawful. 3 Black. Com. 144-152. Hence we find that the form of the declaration in trover and detinue are similar, it being alleged in both that the property came to the hands and possession of the defendant by finding. To be sure Blackstone says that replevin can be maintained only in one instance of an unlawful taking, to wit, that of an unlawful distress. 3 Black. Com. 145. However, this may have been in early times, when personal property was of but small consequence, and when legal remedies were mainly if not solely sought to acquire possession of real estate, or to enforce some right connected therewith, or to collect the rents chargeable thereon, yet in modern times it is held that the law is otherwise, and numerous authorities of the greatest weight lay it down that this action lies in all cases of illegal taking.

Chitty says, by replevin the owner of goods unjustly taken and detained from him, may recover possession thereof. It is principally used in cases of distress, but it seems that it may be brought in any case where the owner has goods taken from him by another. 1 Chit. Pl. 162. And again, "It has been said that replevin lies only in one instance of an unlawful taking: namely, that of an unlawful distress of cattle, damage feasant, or of chattels for rent in arrears; but as before observed, it appears that this action is not thus limited, and if goods be taken illegally, though not as a distress, replevin may be supported." 1

Chit. Pl. 164, and authorities cited. 2 Saund. Pl. & Ev. 760; 2 Wheat. Selw. N. P. 1194. Replevin was generally a coextensive remedy with trespass *de bonis asportatis*. *Pangburn v. Patridge*, 7 Johns. 143, and authorities cited. *Thompson v. Button*, 14 Johns. 87.

There is one exception stated by Blackstone (vol. 3, 151), where he says, "If I distrain another's cattle damage feasant, and before they are impounded he tenders me sufficient amends, now, though the original taking was lawful, my subsequent detainment of them, after tender of amends, is wrongful, and he shall have an action of replevin against me to recover them." * * *

With this single exception the common-law rule is believed to be uniform that replevin does not lie unless the original taking was unlawful in fact, or made so in law by relation, under such circumstances as would have made the taking a trespass *ab initio*. Our statute makes other exceptions. *Kimball v. Adams*, 3 N. H. 182. To sustain these views, see, in addition, Com. Dig., Replevin, A; Buller's N. P. 52; 3 Wooddeson's Lectures, 219; 2 Rolle's Abr. 441; Lord REDESDALE in *Ex parte Mason*, 1 Sch. & Lef. 322, note; and also in *Ex parte Chamberlain*, 1 Sch. & Lef. 322; and in *Shannon v. Shannon*, 1 Sch. & Lef. 324; 7 Johns. 140; Story's Pl. 422, note; *Osgood v. Green*, 30 N. H. 210; *Gardner v. Campbell*, 15 Johns. 401.

But we find in different States that these actions have been generally regulated by statute and made to apply often to very different uses and purposes from those for which they were originally designed. To be sure we find in all the States, perhaps, the actions of trespass and trover retained, trover being generally extended in practice, so as to cover all cases of wrongful detention and conversion, without regard to the fact as to whether the original taking were legal or illegal; but we find that the actions of replevin and detinue have met with very unequal favor in the different States.

In Massachusetts, it has been held that replevin may be maintained in all cases of wrongful detention of the plaintiff's goods, although the original taking may have been justifiable. *Badger v. Phinney*, 15 Mass. 359; *Baker v. Fales*, 16 Mass. 147; *Marston v. Baldwin*, 17 Mass. 606; and in that State, too, it is held that detinue is obsolete. *Baker v. Fales*, 16 Mass. 154; Colby's Prac., and Howes'

Præc., *Detinue*. But these decisions in Massachusetts, so far as they claim to rest upon the common law, have been so often and so seriously questioned, and are opposed by such an overwhelming weight of authority, both English and American, that they may well be considered as having very little weight upon the question. See argument of Webster and Metcalf, in *Baker v. Fales* (page 148), and authorities cited; and, also the numerous notes by the editor, and authorities cited upon this case of *Baker v. Fales*, in the recent editions of Massachusetts Reports; and particularly, note 23, upon the action of *detinue*. See, also, *Wheat. Selw. N. P.* 1194, and note and authorities.

But it is said that these decisions in Massachusetts are authorized by their statute; and if that were so, they would stand well enough, whether they accord with the common law or not. * * *

Judge STORY also seems to doubt whether these decisions in Massachusetts can stand even upon the statute of that State, and he does not hesitate to pronounce their doctrines as innovations upon the common law (*Story's Pl.* 442, note), where, in speaking of the doctrine that *replevin* may be maintained for goods unlawfully detained, although there may have been no tortious taking, he says, "this innovation on the common law, whether attributable to the statute or to the construction given to it, is to be regretted. The gist of the action is altered. It is no longer an unlawful taking, but an unlawful detention. The general issue, *non cepit*, though it can hardly be overruled as a good plea in *replevin*, has ceased to be a logical defense; indeed is no more to the purpose than *nil debet*, in *assumpsit*. It unsettles former decisions, unless some exceptions are set up without any other reason than a desire to avoid overruling former cases. Thus, it was formerly held that *replevin* would not lie on a bailment by the plaintiff; but if *replevin* will lie in all cases of unlawful detention, then it may be maintained in many cases of bailment; and, lastly, it has destroyed the analogy between the actions of *trespass* and *replevin*, where it existed before."

In Pennsylvania, it was decided at an early day that *replevin* would lie wherever one man claimed goods in the possession of another, no matter how the possession was acquired. But in that State the action of *replevin* is authorized and regulated only by statute. *Wallace v. Law-*

rence, 1 Dall. 157. And the law continues the same. *Staughton v. Rappalo*, 3 S. & R. 562; *Keite v. Boyd*, 16 S. & R. 300. There could of course be little necessity for the action of detinue in that case.

In Virginia, it has been held that at common law, replevin lay in all cases where goods were unlawfully taken. And this was the law in that State till 1823, when an act of the legislature confined the writ to the case of distress for rent. *Vaiden v. Bell*, 3 Randolph, 448. In that State we find the action of detinue in very common use, as it is believed to be in all the southern and some of the western States.

* * * * *

In New York, previous to their Revised Statutes, they adhered strictly to the common-law distinction between replevin and detinue and both actions were used. See 7 Johns. 140; 10 Johns. 373; 14 Johns. 87, and 15 Johns. 402, before cited, which were cases of replevin; and *Todd v. Crookshanks*, 3 Johns. 432, which was detinue. But by their Revised Statutes (vol. 2, 553), the action of detinue was abolished, and the action of replevin was made, by express provision of law, to cover the same ground, or nearly so, that detinue had before covered.

But in North Carolina, on the other hand, it is held that detinue lies in every case in which the property is wrongfully detained, without regard to the manner in which the defendant acquired possession. *Johnson v. Preston*, Cameron & Norwood, 464.

It is said in 3 Black. Com. 151, that there is one disadvantage which attends this action (detinue): namely, that the defendant is herein permitted to wage his law, that is, to exculpate himself by oath, and thereby defeat the plaintiff in his remedy, and that for this reason the action itself is much disused, and has given place to the action of trover. See, also, Bac. Abr., Detinue. But the 3 and 4 Wm. IV, ch. 42, sec. 13, abolished the wage of law in all cases; since which, this action has been much in use in England, and is said to be a very advantageous remedy, especially where it is material to embrace in the same action with a count in detinue, another count in debt, for a money demand as due upon a contract. 1 Chit. Pl. 121 and 125.

It does not seem to be clearly settled upon authority, whether the action of detinue should be confined to those

cases where the possession was at first rightful, and only the detention wrongful, or whether that remedy, like trover, should be extended to all cases where the detention is wrongful, without regard to the quality of the original possession. The earlier authorities all favor the former view. Lord Coke says, "that detinue lyeth where any man comes to goods either by delivery or finding." Coke Litt. 286, b. Blackstone lays down this rule, that in order to maintain detinue the first point to be proved is, that the defendant came lawfully into possession of the goods, as either by delivery to him or by finding them. 3 Bl. Com. 151. Bac. Ab., Detinue; Wheat. Selw. N. P. 665.

But it is said by Chitty (1 Chit. Pl. 123) that it is a common doctrine in the books, that this action can not be supported if the defendant took the goods tortiously; but he pronounces the reasoning upon which that opinion is founded as fallacious, and holds that it may be maintained in any case where the detention was wrongful, without regard to the manner in which the defendant acquired possession. And while there would seem to be no good reason for enlarging the remedy by replevin, any more than there is that of trespass *de bonis*; yet it may well admit of a *quaere* whether, as a matter of convenience in practice, and not inconsistently with principle, the action of detinue should not be so far enlarged beyond its original limits, as to keep pace with its kindred action of trover.

It is alleged that detinue has never been used or authorized in this State, and that replevin, trespass, and trover, afford ample remedies for all cases and classes of injuries. But trespass and trover are no substitute for detinue, for they only give damages for the goods taken or converted, without giving the party any chance to recover the chattel *in specie*. In regard to replevin, we understand that the common law is in force here, and that this action only lies in case of a wrongful taking in fact, or by indictment of law with the single common-law exception of cases of cattle taken damage feasant, when amends are tendered before impounding, and other exceptions made by our statute in case of animals impounded, where it is held that it lies for a wrongful detention as well as a wrongful taking. * * *

In accordance with these views is the form of the writ prescribed by law in the action of replevin (Rev. Stat.,

ch. 182, sec. 14; Comp. Laws 464), commanding the sheriff to replevy the goods belonging to A. P., of, etc., "wrongfully taken and detained," as it is said, etc. It would seem that this form embraces the common law, as nearly as may be, as stated in the English cases, replevin there being held to be the proper remedy in cases where property has been wrongfully taken and detained, whether as a distress or in any other way.

Replevin then does not encroach upon the common-law ground of detinue, but leaves all that ground for the application of that remedy. It is only when replevin is carried beyond the common-law limit, as in Massachusetts, by the court, and as it is in some States, as in New York, by statute, that it can be said at all to supersede the necessity of detinue as a remedy where the original taking was lawful, and it is desired to recover the thing detained, *in specie*.

Nor do we find our statutes silent concerning the action of detinue. * * *

It would seem that detinue was a remedy as fully recognized by our laws, and provided for as specifically as any of the other forms of personal actions. Nor is its place superseded by any other form of action. There are also good and sufficient reasons when it should be used, even if it were a concurrent remedy with replevin. In the latter, the plaintiff resumes the property in the first instance, and if he does not prevail, he must pay the defendant the value of the property, as by our practice there is no judgment for a return. *Bell v. Bartlett*, 7 N. H. 188. But in detinue, though the claim be to recover the specific chattel, yet it is not taken from the hands of the defendant till the right is determined, and the plaintiff takes his property on his execution. No bonds are required.

Detinue may also be joined with debt in the same declaration, which, in a large class of cases, is a decided advantage. It may also be brought for several articles, part of which are in existence, and can be recovered, and a part of which may have been converted, conveyed away, or destroyed; as the judgment in detinue is in the alternative, first, that the plaintiff do recover the goods in question specifically; or, secondly, if the plaintiff can not have the goods, that he recover the value thereof, and his damages for the detention.

The jury must therefore find the value not only of all the goods in the aggregate, but of each article separately, so that the plaintiff may have all that can be found of his property *in specie*, and for the balance, whatever it may prove to be, he may recover his damages, and this all in one suit and by a single judgment and execution. 1 Wheat. Selw. N. P. 667; Saund. Pl. and Ev., *ante*.

The difference in the course of proceedings, in the two cases (replevin and detinue), results naturally from the different injuries for the redress of which these remedies were invented. Where the taking was illegal and wrongful, the redress was by replevin, in which the possession of the property was immediately returned to the party from whom it had been thus wrongfully taken; and the parties were then left to determine their several rights. But where the possession was legally and rightfully obtained, as by a bailment, or a finding, but the further detention was claimed to be wrongful, the plaintiff was not allowed to take the property in any summary manner from the hands of the defendant, to whom, perhaps, he had himself committed it; but he must first try his title and establish his right, and if he proved the detention to be wrongful, he then recovered his goods.

We think, then, that there are sufficient grounds, both upon the statute and upon authority and reason, as well as convenience, for holding that detinue in this State can be maintained.

The demurrer is overruled.

SECTION 7. EJECTMENT.³³

JACKSON, EX DEM. LOUX v. BUEL

Supreme Court of New York. 1812.

9 Johnson, 298.

This was an action of ejectment, to recover the possession of part of lot number ninety-four, in the township of

33. DECLARATION IN EJECTMENT. "Richard Roe was attached to answer John Doe of a plea, wherefore he the said Richard Roe, with force and arms, etc., entered into the manor of —, in the county of —, with the

Ulysses. The cause was tried at the Seneca circuit, in June, 1812, before Mr. Justice SPENCER.

The plaintiff produced in evidence a patent to Hendrick Loux, one of the lessors, dated the 8th of July, 1790, for the whole of lot number ninety-four, also a deed for the same lot from Jeremiah Van Rensselaer, to whom it had been awarded, to Robert M'Dowel, dated the 24th of April, 1792. M'Dowel was dead, and the other lessors were his heirs at law.

The defendant gave in evidence a deed, dated the 30th of April, 1797, from M'Dowel to John Smith, for ten acres, part of the lot number ninety-four, containing a reservation in the words following, to wit, "Excepting and reserving to the said Robert M'Dowel, his heirs and assigns, for ever, the right and privilege, without any fee or reward, of erecting and building a dam on the back of the creek, near or at the place where the east line of the above granted premises crosses said creek, along the west bank of said creek, about twenty rods, or near where the mill-seat is, to occupy and possess the aforesaid premises, without any let, hindrance or molestation from the said party of the second part, his

aforesaid, which is not expired, and ejected him the said John Doe, out of his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our said lord the king; wherefore the said John Doe saith that he is injured, and hath sustained damage to the value of 50 l. and therefore he brings his suit, rights, members and appurtenances thereunto belonging, which A B (this is to be the person who is the real plaintiff, and who had the legal estate and the right of possession at the time of the supposed demise) had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm; and other wrongs to the said John Doe, then did, to the great damage of the said John Doe, and against the peace of our lord the now king, etc.—and thereupon the said John Doe, by E. F. his attorney, complains, that whereas the said A B on the — day of — (care must be taken to insert some day after the lessor's right of entry commenced) in the — year of the reign of our said lord the king, at the parish aforesaid, in the county aforesaid, had demised the said tenements, with the appurtenances to the said John Doe, to have, and to hold the same to the said John Doe, and his assigns, from the — day — (this is usually the day before that of the demise) in the — year aforesaid, for, and during, and unto the full end and term of — (it is usual to insert seven years if the demise be recent, but a sufficient number of years should be inserted so as certainly to extend beyond the time when final judgment may be obtained) years, from thence next ensuing, and fully to be completed and ended. — By virtue of which said demise, the said John Doe entered into the said tenements, with the appurtenances, and became and was thereof possessed, for the said term, so to him thereof granted, as aforesaid. And the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on the — day of — (the ejectment or ouster should be stated to have been after the commencement of the supposed demise) in the — year aforesaid, with force and arms, etc., entered into the said tenements, with the appurtenances, in

heirs or assigns, agreeably to the express condition contained in the foregoing clause and reservation." The deed of John Smith to the defendant, for the said ten acres of land was also read in evidence. It was proved that the defendant was in possession of the whole ten acres, and that the defendant's milldam extended twenty-four links on the land of the lessors of the plaintiff. In 1811, Pelton, one of the lessors, requested the defendant to let him enter on the premises, and build a dam on the creek, according to the reservation in M'Dowel's deed to Smith, which was refused by the defendant. A verdict was taken for the plaintiff, subject to the opinion of the court. And the question was, whether, under the judgment, possession could be taken of the premises reserved in the deed from M'Dowel to Smith, or only of the premises in the possession of the defendant, and not included in the ten acres.

PER CURIAM. The lessor of the plaintiff is entitled to recover the possession of the defendant, extending beyond the ten acres. This is admitted by the case; but the great point is, whether the right reserved in the deed of erecting

which the said John Doe was so interested, in manner, and for the term etc. (At the foot of the declaration, a notice to appear must be subscribed as follows:)

"Mr. C D [The tenant in actual possession.]

"I am informed that you are in possession of, or claim title to, the premises in this declaration of ejectment mentioned, or to some part thereof, and I being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear in next — term, in his majesty's court of king's bench, wheresoever, etc., by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made defendant in my stead, otherwise, I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession. Dated this — day of —, A. D. —.

"Yours, etc.,
"RICHARD ROE."

2 Chitty on Pleading, 394-397.

The allegations in this declaration are largely fictitious. As said by Lord MANSFIELD in *Fairclain v. Shamtitle* (1762) 3 Burr. 1294, "An ejectment is an ingenious fiction, for the trial of titles to the possession of land. In form, it is a trick between two, to dispossess a third by a sham suit and judgment. The artifice would be criminal, unless the court converted it into a fair trial with the proper party."

The occasion for the development of this fictitious form of action was the lack of a satisfactory, direct method of trying titles. The ancient methods were formal, cumbersome, costly and slow. In the reigns of Edward II and Edward III a new writ was invented called *ejectione firmæ* (ejectment from the farm), in the nature of a writ of trespass, which, through later development, gave a tenuous remedy against any person who ousted him from his term, by a judgment to recover the term and a writ of possession thereupon. This was a rapid and summary remedy. And it involved the title of the tennor, for to prove his right the lessee had to establish the title of his lessor. Now if the existence of a term made the determination of title possible

or building a dam on the bank of the creek at the place specified, be such an interest as that an ejectment will lie for it. The exception further states that the grantor, etc., is to occupy and possess the aforesaid premises without any let, etc. It is evident that an interest in the soil was reserved at the given place, not only for erecting the dam, but for occupying and possessing it. There can be no doubt but that this interest would be considered a *tenement*, within the decisions under the English settlement law; for it has been held that a right of pasturage, of a dairy, of a rabbit warren, and of a fishery, carried such an interest in the land as to create a tenement. (1 Term Rep. 358, 2 Term Rep. 451, 3 Term Rep. 772, 4 Term Rep. 671.) In one of the cases, ASHHURST, J. said that a fishery was a tenement, and recoverable in ejectment; and in another of them Lord KENYON held that a *praecipe* would lie for a free warren, though the party has no further interest in the land than to enter and use the animals; and if a *praecipe* will lie *a fortiori* an ejectment, which requires much less certainty, will lie. In *Mellington v. Goodlittle* (And. 106) it was decided in error, that an ejectment would lie for a beast or cattlegate which was a right of common for a beast; and in that case the court admitted that an ejectment

through this simple and direct action, it soon occurred to the ingenious lawyers of that day that they might make a term to order for the sole purpose of using it as a basis of trying the title to the land. Accordingly, if A claimed title to a tenement which was in the possession of B, all A, the claimant, had to do was to lease it to C, have C ejected by B, the occupant, and then have C resort to this action of *ejectione firmæ* to recover his term. C proved his title to the term by showing A's title to the land, and if C recovered the term A's title to the land was thereby established. The action was wholly in A's interest, and after it was over C merely dropped out of sight.

The method employed was simple. A and C entered upon the land and A then and there sealed and delivered the lease to C. A then departed, leaving C upon the land until the occupant should find and eject him. The right of action was then complete. But this method involved trouble with the occupant, which resulted in an innovation. A brought two friends with him, one to receive the lease and the other to do the ejecting, so that the action was a feigned controversy between A's two friends. The friend who received the lease was plaintiff, and the other friend, called the casual ejector, became defendant in the action. Naturally the casual ejector, being a mere agent of A, would suffer default; which enabled C to obtain a judgment establishing A's right to the land without giving the real occupant any opportunity to defend his own title. Accordingly, the courts refused to try these actions unless notice was given to the occupant, as shown in the form above quoted from Chitty.

In this proceeding the lessee and the casual ejector were real persons. But later Lord Chief Justice ROLLE simplified the procedure by allowing them to become fictitious. John Doe, plaintiff, a fictitious person, alleges a fictitious lease of the land to himself from the real adverse claimant, a fictitious entry

would lie for a common appurtenant. Whenever a right of entry exists, and the interest is tangible, so that possession can be delivered, an ejectment will lie; and such an interest was reserved by the deed in question.

The lessor of the plaintiff is, accordingly, entitled to recover, as well the premises reserved, as the other land encroached upon by the defendant.³⁴

by himself, and a fictitious ouster during the term by Richard Roe, the defendant, another fictitious person. A notice is then delivered to the real occupant in possession purporting to come from Richard Roe, advising the occupant to appear and defend the action. The occupant is permitted by the court to defend on condition that he will admit the fictitious allegations of lease, entry and ouster. This leaves as the only issue to be tried, the right of the adverse claimant to make a lease. The adverse claimant and the occupant thus try out the question of the former's right to make a valid lease of the premises, and so the title is determined. The parties to the action were the two fictitious persons, and they were given any names the pleader chose, as Doe and Roe, (Burr. 1996) Holdfast and Thrustout, (6 T. R. 223), Peaceable and Troublesome, (Barn. 172), Fairclaim and Shamtitle, (Burr. 1290). The cases were entitled so as to designate the true parties, as Doe on the demise of Bromfield v. Smith (6 East 530) which might be contracted to read Doe *ex dem.* Bromfield v. Smith; or it might read Doe *ex dem.* Bromfield v. Roe, not indicating the real defendant.

See Adams on Ejectment, 1-16; Perry on Common Law Pleading, 93-99.

34. But where a lease granted the privilege "of putting a carding machine at the mills of John Van Den Bergh," and "to fix the machine at the wheel or shaft now built for a pulling-mill at the place aforesaid" and "to build a shop for a carding machine," but the exact location had not been fixed and could not be described by metes and bounds, ejectment was held not to lie, for the sheriff could not deliver possession. —*Jackson v. May* (1819) 16 Johns. (N. Y.) 184.

COLSTON v. McVAY.

Court of Appeals of Kentucky. 1818

1 A. K. Marshall, 251.

The CHIEF JUSTICE delivered the opinion of the court.

The only question in this case is, can the defendant, in an action of ejectment, defeat the recovery of the plaintiff, by showing a grant from the commonwealth to a stranger, elder than that under which the lessor of the plaintiff derives title?

The court below decided the question in the affirmative; and we have no hesitation in affirming the decision to be correct. That there cannot, at the same time, be two or

more adverse rights of entry to the same land, is a proposition which is intuitively evident, and which neither admits nor requires proof to support it; and it is a point no less incontrovertible, that the elder grant transfers to the grantee a right of entry. If, therefore, there be a grant to a stranger, elder than that under which the lessor of the plaintiff derives title, it results, as an inevitable consequence, that he cannot have a right of entry, and without a right of entry, he cannot recover in an action of ejectment. Whether the defendant holds under the elder grant or not, can make no difference, for it is a settled doctrine that the lessor of the plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's.³⁵

The judgment must be affirmed, with costs.

35. Possession is *prima facie* evidence of the right of property, so that a defendant in possession has a *prima facie* title, which can be overcome only by some higher title. This may consist of a valid documentary chain of title from the government, or it may consist of mere prior possession, for as against a mere possessor, prior peaceable possession is better evidence of title and therefore a good title.—*Doe v. West* (1821) 1 Blackf. (Ind.) 133.

PRESIDENT, RECORDER AND TRUSTEES OF THE
CITY OF CINCINNATI v. LESSEE OF
EDWARD WHITE.

Supreme Court of the United States. 1832.

6 Peters, 431.

Mr. Justice THOMPSON delivered the opinion of the court.

The ejectment in this case was brought by Edward White, who is also the defendant in error, to recover possession of a small lot of ground in the city of Cincinnati, lying in that part of the city usually denominated the Common. To a right understanding of the question upon which the opinion of the court rests, it will be sufficient to state generally, that on the 15th of October in the year 1788, John Cleves Symmes entered into a contract with the then board of treasury, under the direction of congress, for the purchase of a large tract of land, then a wilderness, including that where the city of Cincinnati now stands. Some negotiations

relative to the payments for the land delayed the consummation of the contract for several years. But on the 30th of September, 1794, a patent was issued conveying to Symmes and his associates, the land contracted for; and as Symmes was the only person named in the patent, the fee was of course vested in him.

Before the issuing of the patent, however, and, as the witnesses say, in the year 1788, Mathias Denman purchased of Symmes a part of the tract included in the patent, and embracing the land whereon Cincinnati now stands. That in the same year, Denman sold one-third of his purchase to Israel Ludlow, and one-third to Robert Patterson. These three persons, Denman, Ludlow and Patterson, being the equitable owners of the land (no legal title having been granted), proceeded in January, 1789, to lay out the town. A plan was made and approved of by all the proprietors; and according to which the ground lying between Front street and the river, and so located as to include the premises in question, was set apart as a common, for the use and benefit of the town for ever, reserving only the right of a ferry; and no lots were laid out on the land thus dedicated as a common.

The lessor of the plaintiff made title to the premises in question under Mathias Denman. * * * In March, 1795, Denman conveyed his interest, which was only an equitable interest in the lands so located to Joel Williams; and on the 14th of February, 1800, John Cleves Symmes conveyed to Joel Williams in fee, certain lands described in the deed which included the premises in question; and on the 16th of April, 1800, Joel Williams conveyed to John Daily the lot now in question. And the lessor of the plaintiff, by sundry mesne conveyances, deduces a title to the premises to himself.

* * * * *

And it is very satisfactorily proved, that Joel Williams, from whom the lessor of the plaintiff deduces his title, well understood, when he purchased of Denman, and for some years before, that this ground had been dedicated as a public common by the proprietors. The original plat, exhibiting this ground as a common, was delivered to him at the time of the purchase. And when he afterwards, in the year 1800, took a deed from Symmes, he must, according to the evidence in the case, have known, that he was a mere trustee,

holding only the naked fee. And from the notoriety of the fact, that these grounds were laid open and used as a common; it is fairly to be presumed, that all subsequent purchasers had full knowledge of the fact.

But it is contended that the lessor of the plaintiff had shown the legal title to the premises in question in himself, which is enough to entitle him to recover at law; and that the defendants' remedy, if any they have, is in a court of equity. And such was substantially the opinion of the circuit court, in the fourth instruction asked by the plaintiff, and given by the court, viz., "that if the said proprietors did appropriate said ground, having no title thereto, and afterwards acquired an equitable title only, that equitable title could not enure so as to vest a legal title in the city or citizens, and enable them to defend themselves in an action of ejectment brought against them by a person holding the legal title.

We do not accede to this doctrine. For should it be admitted, that the mere naked fee was in the lessor of the plaintiff, it by no means follows that he is entitled to recover possession of the common in an action of ejectment.

This is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession; and whatever takes away this right of possession, will deprive him of the remedy by ejectment. Adams's Eject. 32. Starkie, part 4, 506, 507.

This is the rule laid down by Lord MANSFIELD in *Atkins v. Horde*, 1 Burr. 119. An ejectment, says he, is a possessory remedy, and only competent where the lessor of the plaintiff may enter; and every plaintiff in ejectment must show a right of possession as well as of property. And in the case of *Doe v. Staple*, 2 Durn. and East, 684, it was held, that although an outstanding satisfied term may be presumed to be surrendered, yet an unsatisfied term, raised for the purpose of securing an annuity, cannot, during the life of the annuitant; and may be set up as a bar to the heir at law, even though he claim only subject to the charge. Thereby clearly showing the plaintiff must have, not only the legal title but a clear present right to the possession of the premises; or he cannot recover in an action of ejectment. And in the case of *Doe v. Jackson*, 2 Dowl. and Ryl. 523, BAILEY, Justice, says, "an action of

ejectment, which from first to last is a fictitious remedy, is founded on the principle, that the tenant in possession is a wrong-doer; and unless he is so at the time the action is brought, the plaintiff cannot recover."

If then it is indispensable that the lessor of the plaintiff should show a right of possession in himself, and that the defendants are wrong-doers; it is difficult to perceive on what grounds this action can be sustained.

The later authorities in England which have been referred to, leave it at least questionable, whether the doctrine of Lord MANSFIELD in the case of *Goodtitle v. Alker* (1 Burr. 143), "that ejectment will lie by the owner of the soil for land, which is subject to a passage over it as the king's highway;" would be sustained at the present day at Westminster Hall. It was not even at that day considered a settled point, for the counsel on the argument (page 140) referred to a case, said to have been decided by Lord HARDWICKE; in which he held that no possession could be delivered of the soil of a highway, and therefore no ejectment would lie for it.

This doctrine of Lord MANSFIELD has crept into most of our elementary treatises on the action of ejectment, and has apparently, in some instances, been incidentally sanctioned by judges. But we are not aware of its having been adopted in any other case where it was the direct point in judgment. No such case was referred to on the argument, and none has fallen under our notice. There are, however, several cases in the supreme court of errors of Connecticut, where the contrary doctrine has been asserted and sustained by reasons much more satisfactory than those upon which the case in Burrow is made to rest. *Stiles v. Curtis*, 4 Day, 328; *Peck v. Smith*, 1 Conn. Rep. 103.

But if we look at the action of ejectment on principle, and inquire what is its object, it cannot be sustained on any rational ground. It is to recover possession of the land in question; and the judgment, if carried into execution, must be followed by delivery of possession to the lessor of the plaintiff.

The purpose for which the action is brought, is not to try the mere abstract right to the soil, but to obtain actual possession; the very thing to which the plaintiff can have no exclusive or private right. This would be utterly inconsistent with the admitted public right. That right con-

sists in the uninterrupted enjoyment of the possession. The two rights are therefore incompatible with each other, and cannot stand together. The lessor of the plaintiff seeks specific relief, and to be put into the actual possession of the land. The very fruit of his action, therefore, if he avails himself of it, will subject him to an indictment for a nuisance; the private right of possession being in direct hostility with the easement, or use to which the public are entitled; and as to the plaintiff's taking possession subject to the easement, it is utterly impracticable. It is well said, by Mr. Justice SMITH in the case of *Stiles v. Curtis, supra*, that the execution of a judgment in such case, involves as great an inconsistency as to issue an *habere facias possessionem* of certain premises to A., subject to the possession of B. It is said, cases may exist where this action ought to be sustained for the public benefit, as where erections are placed on the highway, obstructing the public use. But what benefit would result from this to the public? It would not remove the nuisance. The effect of a recovery would only be to substitute another offender against the public right, but would not abate the nuisance. That must be done by another proceeding.

It is said in the case in *Burrow*, that an ejectment could ~~be maintained because trespass would lie.~~ But this ~~certainly does not follow.~~ The object and effect of the recoveries are entirely different. The one is to obtain possession of the land, which is inconsistent with the enjoyment of the public right; and the other is to recover damages merely, and not to interfere with the possession, which is in perfect harmony with the public right. So, also, if the fee is supposed to remain in the original owner, cases may arise where perhaps waste or a special action on the case may be sustained for a private injury to such owner. But these are actions perfectly consistent with the public right. But a recovery in an action of ejectment, if carried into execution, is directly repugnant to the public right.

Upon the whole, the opinion of the court is, that the judgment must be reversed, and the cause sent back with directions to issue a *venire de novo*.³⁶

36. An equitable title will not support ejectment. "That the plaintiff in ejectment must in all cases prove a legal title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an equitable estate will not be sufficient for a recovery, are principles so elementary

and so familiar to the profession as to render unnecessary the citation of authority in support of them. Such authority may, however, be seen in the cases of *Goodtitle v. Jones*, 7 T. R. 49; of *Doe v. Wroot*, 5 East, 132; and of *Roe v. Head*, 8 T. R. 118. This legal title the plaintiff must establish either upon a connected documentary chain of evidence, or upon proofs of possession of sufficient duration to warrant the legal conclusion of the existence of such written title.—*Fenn v. Holme* (1858) 21 How. (U. S.) 481.

GOODRIGHT ON THE DEMISE OF BALCH v. RICH.

Court of King's Bench. 1797.

7 Term Reports, 327.

Ejectment for thirty acres of land, twenty acres of meadow, and twenty acres of pasture, with the appurtenances, situate in the parishes of Over Stowey and Nether Stowey, in the county of Somerset. The defendants pleaded the general issue, and entered into the common consent rule as tenants. The cause was tried before Mr. Justice BULLER, at Taunton, when a verdict was found for the plaintiff, subject to the opinion of this Court on the following case. The lessor of the plaintiff proved his title to certain lands in the parishes mentioned in the declaration of ejectment, which lands were called Clutsome's, Dunscombe's, Landsey's Breach, Griddle's Breach, and the Gore Platt, which were the premises in question. The defendants proved that they were not, nor ever had been in possession of any part of the premises in question. The only point reserved at the trial was whether the defendants after entering into the conditional rule could be permitted to prove that they neither were or had been in possession of the premises, which the plaintiff by the evidence had entitled himself to. If such proof on the part of the defendants were admissible, a nonsuit was to be entered; otherwise the verdict was to stand.

* * * * *

Lord KENYON, Ch. J.: This has certainly been *vexata questio*; when I went the circuit as counsel, the case in Buller's Ni. Pri., in which it was said "If there be but one defendant as tenant in possession, the plaintiff need not prove him in possession," was supposed to be law; and when a case afterwards came on before me on the Home

Circuit I ruled accordingly, not thinking it necessary to prove the defendant in possession. But I was never called on to consider the question accurately till now; and when we consider the reason of the thing, it seems wonderful that any question could seriously have arisen upon this subject. On the trial of an ejectment two parties come to litigate the title to an estate, the person claiming, and the person who is supposed to withhold improperly, the possession; but as soon as it turns out that the latter is not in possession, it seems to me that the cause is ill constituted between those two persons. The proceedings in ejectment were instituted in order to try who is entitled to the possession of an estate on title: when the declaration is delivered the lessor of the plaintiff claims in general terms so many acres of land, so many messuages, etc., which communicates but little intelligence to the person served with the declaration. If the latter happen to be in possession of any land falling within the description in the declaration, he must defend in order to preserve his own right; then it would be unjust that a verdict should be found against him though he can prove a title to every acre of land in the parish of which he was ever in possession; and yet this is the consequence of the plaintiff's argument. * * * This point, however, came under the consideration of the Court in the case reported in *Wilson*, where it was holden that the plaintiff must prove the defendant in possession; and I think that that case was properly decided.³⁷ * * *

37. *When the plaintiff is in possession he may, in proper cases, resort to a bill in equity to quiet title. Such a proceeding is authorized in equity to protect the owner of the legal title from being disturbed in his possession or harassed by suits in regard to his title, and can be availed of only by the owner of the legal title who is in possession. "A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for if his title is legal, his remedy at law, by action of ejectment, is plain, adequate and complete; and if his title is equitable, he must acquire the legal title, and then bring ejectment."*—*Frost v. Spitley* (1886) 121 U. S. 552, 556.

If lands are unoccupied, an action of ejectment may be brought, on the theory of constructive possession, against a party out of possession claiming title, if such claim is accompanied by acts of ownership, such as enclosure, cultivation, and the like.—*Garner v. Marshall* (1858) 5 Cal. 268, 271. Statutes frequently authorize ejectment in such cases. See *Converse v. Dunn* (1897) 166 Ill. 25; *Goodman v. Nester* (1887) 64 Mich. 662.

SECTION 8. DEBT.³⁸

BULLARD v. BELL.

*Circuit Court of the United States for the First District.
1817.*

1 Mason, 243.

[Plaintiff was the holder of a bank bill which he had presented to the issuing bank for payment and payment had been refused. He then brought this action in debt against

38. DECLARATIONS IN DEBT. *On specialty.* "For that whereas the said A B heretofore, to wit, on, etc. at, etc. demised to the said C D, a certain message, land and premises, with the appurtenances, situate, etc. to have, to hold the same to the said C D, for a certain term of years, to wit, for and during, and until the full end and term of twenty-one years, then next ensuing, and fully to be complete and ended, yielding and paying therefor, during the said term, to the said A B, the yearly rent of — l. of lawful, etc. at the four most usual feasts, or days of payment in the year, that is to say, etc. by even and equal portions. By virtue of which said demise, the said C D entered into the said demised premises, with the appurtenances, and was possessed thereof from thenceforth, until and upon the feast of St. Michael the Archangel, A. D. 1806, when a large sum of money, to wit, the sum of — l. of the rent aforesaid, for the space of — then elapsed, became and was due and payable from the said C D to the said A B, and still is in arrear and unpaid to the said A B, to wit, at, etc. aforesaid. Whereby an action hath accrued to the said A B, to demand and have of and from the said C D, the said sum of — l. parcel of the said sum above demanded: Yet the said C D, although often requested so to do, hath not as yet paid the said sum of — l. above demanded, or any part thereof, to the said A B. But he to do this hath hitherto wholly refused, and still doth refuse. To the damage of the said A B of — l. and therefore he brings his suit, etc." 2 Chitty on Pleading, 144, 172.

On simple contract. "For that whereas, the said C D on, etc. at, etc. was indebted to the said A B in the sum of — l. of lawful money of Great Britain for the work and labor, care and diligence of the said A B, before that time done, performed and bestowed, by him the said A B and his servants, and with his horses, carts and carriages, in and about the business of the said C D, and for the said C D, and at his special instance and request, to be paid by the said C D to the said A B, when he the said C D should be thereunto afterwards requested, whereby and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said A B to demand and have of and from the said C D, the said sum of — l. parcel of the said sum above demanded. Yet the said C D, although often requested so to do, hath not yet paid the said sum of — l. above demanded, or any part thereof, to the said A B. But he to do this hath hitherto wholly refused, and still doth refuse. To the damage of the said A B of — l. and therefore he brings his suit, etc." 2 Chitty on Pleadings, 32, 142, 144.

Compare this form, which is a common count in debt, with the common counts in *assumpsit*. The common counts in debt correspond closely to those in *assumpsit*, being based upon goods sold and delivered, work and labor done, money lent, money paid, money had and received, account stated, etc.

the defendant, who was an original stockholder of the bank, under a statute which declared that upon the refusal of a bank to pay any of its own bills upon presentment, the

ORIGIN AND SCOPE OF THE ACTION OF DEBT.

"The action of debt is certainly the broadest of the contractual remedies and is perhaps the broadest of all the common-law remedies; that is to say, it can be used to obtain satisfaction of duties of more diversity than any other action. By nature debt is an action of contract, but it is also the normal remedy upon duties created by custom or record, and is therefore broader than the field of pure contractual duty. In other words, it is a remedy upon quasi-contractual as well as contractual duties. * * *

"Its nature can perhaps best be defined by saying that the action of debt lies to enforce legal duty created by contract, by custom or by record. The sole limitation upon such legal duty is the requirement that the duty be one for payment of a sum certain of money or for the delivery of an ascertained amount of ponderable or measurable chattels. Debt then, we may say, lies to recover money or chattels due and made certain in amount by contract, by custom, or by record. * * *

"The duty to return a borrowed implement of husbandry, or a specified amount of barley consumed by the borrower, was placed in the same legal category as the duty to return a loan of money. * * Before long, however, the law began to separate these ideas, and as this progressed the action of debt split up into two forms, the action of debt in the debet et detinet being used for the recovery of money debts and for the recovery of a specified amount of ponderable or measurable chattels, while debt in the detinet was used for the recovery of specific chattels. This latter form of action gradually acquired a distinct character, being known by the name of detinue. The recognition of detinue as a separate action thus narrowed the scope of debt proper (in the debet et detinet) to the limits indicated in the definition above given.

"In modern times the money debt has become by far the most conspicuous and important form of the simple contract debt, but in legal theory there has been no severance between the money and chattel debt. They are enforced by the same form of action; and after all, money is only one sort of chattel. * * * One who owed money or chattels was conceived as wrongfully withholding from the creditor property which belonged to such creditor; and he was not viewed merely as being bound by the obligation of law to make compensation. In other words, the debt, whether of money or chattels, was viewed as a real and substantive thing. * * * As in the writ of right for land, the action was based on ownership; and the writ of debt has been aptly called the 'writ of right for money.' The analogy between debt and the proprietary action for land is shown in the further circumstance that in both there might be trial by battle; but the offer of proof by battle has not actually been found in actions of debt. * * *

"A feature of debt which doomed the action to obsolescence so soon as assumpsit could be used in its stead, was found in the fact that the defendant could wage his law. All simple debts were subject to this mode of defense, but the specialty and debts of record were not. When the right of the defendant to wage his law was indirectly taken away by the decision in Slade's Case, (4 Coke 92, in 1602) which permitted assumpsit to be used in suing upon simple debts, the old practitioners looked upon the innovation as a great hardship. * * * When the wager of law became obsolete in the eighteenth century, debt gave some indications of a power to recover some of its lost ground. * * * By statute in 1833 the wager of law was totally abolished. * * * But it was too late to bring the action back into frequent use, for a few years later all forms of action shared a common fate upon the passage of the Procedure Acts.

"In America, it should be observed, the wager of law never gained recognition as a legal mode of defense. * * * The action of debt, in this country has not therefore been hampered by the limitations imposed upon the action by the wager of law." 3 Street's Foundations of Legal Liability, chap. XI.

stockholders of the bank should be jointly and severally liable to the holders of the bills for the payment thereof.]³⁹

STORY, J.: * * *

* * * * *

And this brings us to the second question, whether debt lies in this case; a question which, though purely technical, goes to the very marrow of this cause; for under existing circumstances, if the plaintiff has not this remedy, he is probably barred of every other by lapse of time.

Many cases have been stated at the argument, in which an action of debt will lie. It is said, that it will lie upon express and implied contracts, and upon legal liabilities. This is certainly true; but it is true to a limited extent only; for it will not lie upon all simple contracts, nor upon all legal liabilities. It will not, for instance, lie upon a mere simple contract to indemnify a party, or to do any other act or thing, except to pay money or deliver goods.

In respect to liabilities or rights created by Statute, where no specific action is given, debt is often a proper, but is by no means a universal remedy. It is very correctly laid down by Chief Baron COMYN, that upon every Statute made for the remedy of any injury, mischief, or grievance, an action lies by the party grieved, either by the express words of the Statute or by implication; and that such action shall be a recompense to the party. But the action here spoken of is not any one specific remedy; but an action adapted to the nature of the case, and moulded according to the forms and distinctions of the common law. It may be an action of debt, or *assumpsit*, or trespass, or case, as the particular nature of the wrong or injury may require. For instance, Lord COKE informs us, that upon the Statute of Magna Charta, which enacts, that no free man shall be arrested or imprisoned, etc., unless by the law of the land, if any be imprisoned contrary to law, he may have an action founded upon this Statute. No person can suppose, that debt or *assumpsit* would here be a proper form of action; but the proper remedy would be an action of trespass, or (as Lord COKE seems also to intimate) a special action of the case. * * * So upon the Statute of Hue and Cry, which makes the hundred "answerable for the robberies done and the damages," an action on the case, and

39. Synopsis of the facts by the editor.

not an action of debt, lies for the party grieved; for the cause sounds properly in damages. And the same rule applies to other Statutes, where the compensation depends on unliquidated damages. On the other hand, on the Statute of 2 Edw. 6, ch. 13, which gives a forfeiture of the treble value for not duly setting forth tithes, debt has been held to lie. * * * And cases may arise under a Statute, in which the parties may have divers remedies. For instance, by the Statutes of New Hampshire and Massachusetts, towns are obliged to support paupers having settlements therein; and are compellable, in certain cases, to pay the expenses incurred by other towns on account of such paupers. Actions of *assumpsit* upon these Statutes are very frequent; and (assuming that corporations have a capacity to make a promise) there cannot be a doubt, that the action well lies; for the Statutes create a direct and immediate liability *quasi ex contractu*. But there can be as little doubt, that an action of debt will lie in the same case, as the claim is for a determinate sum of money, arising from a legal and direct duty, if the Statute do not point to any other form of action.

The result of this examination instructs us, that the action to be pursued to enforce a statutable right, obligation, or remedy for a grievance, is not necessarily debt, but depends upon the subject-matter and nature of the provisions of the Statute; and that it is not sufficient, in the present case, for the defendant to establish affirmatively, that an action of *assumpsit* or case might well lie; but negatively, that an action of debt will not.

✱ The principal ground, upon which it is argued, that debt will not lie in this case, is, that this is a collateral liability, created by Statute; and that, by analogy to the rule of law, that debt will not lie on any collateral undertaking by contract, it will not lie in this case, which is *quasi ex contractu*. By the ancient Common Law, all matters of personal contract were considered as binding only in the light of debts; and the only means of recovery in a Court was by an action of debt. And the legal notion of a debt was, a duty, created by the Common Law upon some good consideration, moving immediately between and for the benefit of both parties; such as upon a borrowing, a sale, a lending, a hiring, or a deposit. In short, contracts of debt were (as Lord C. J. VAUGHAN declares) deemed reciprocal grants.

Lord Chief Baron COMYN lays it down as a general proposition, that "debt lies upon every express contract to pay a sum certain." Mr. Justice BLACKSTONE asserts the same doctrine in still more precise terms. "Any contract (says he), whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt." The true test is, therefore, whether the sum to be recovered has upon the contract itself, a legal certainty. Following, therefore, the principle of the old decisions, we may well hold, that debt does not lie upon any collateral undertaking, where the sum to be recovered is uncertain, and sounds merely in damages. But whenever the law, upon any undertaking, whether direct or collateral, gives the party a title to a determinate sum, which becomes his absolute due by the rules applied to the contract, it should seem, that an action of debt must, upon admitted principles, be held to lie. Indeed, an action of debt against a pledge or collateral security, *eo nomine*, is as old as the Common Law itself; and Glanville gives the form of the writ against them. It was, to be sure, necessary, that the engagement should be under seal, or be binding by custom for a sum certain (though Fitzherbert seemed to think otherwise); yet this was because, by the law of the land, the engagement was otherwise not binding, but was void as a *nude pact*. It does not seem to me an over-straining of the old doctrine, to apply it to any cases of collateral undertakings, in respect to which the law now pronounces, that the parties to the contract are bound to pay, not unliquidated damages, but a sum certain. For instance, the engagement of an endorser of a bill or note is merely collateral; yet, upon the default of the maker or acceptor, he is clearly liable by law to pay to the holder a determinate sum, the very sum stated in the bill or note. It is a duty, created by the custom of merchants, which is a part of the law of the land. It would be a violation of the first principles of law, for the Court to direct, or the jury to give, a less sum to the holder. How then it can be correctly held, that debt does not lie by the holder against the endorser in such a case, I profess myself unable to comprehend. I must say with Lord LOUGHBOROUGH, that "I cannot devise a substantial reason, why a promise to pay money not performed does not become a debt; and why it should not be recoverable, *eo nomine*, as a debt." If,

however, "the authorities are too strong to be resisted," it will become our duty to bow to them, however unsatisfactory they may be. But when we find, that this doctrine rests mainly on a case in *Hadres*, which was decided at a time, when the law relative to negotiable instruments was very little understood, and which has been recently overturned by an unanimous decision of the Supreme Court; and when it has been decided, that an action of debt lies by the payee of a bill of exchange against the drawer, whose engagement is certainly collateral, I own, that I am not without hope, that the law will, on this subject, be followed out upon its genuine and rational principles. If, therefore, the present case were to be considered exactly like the case of an endorser of a note, I am not quite prepared to admit, that an action of debt could not be sustained.

But we may well leave that point to be decided, when it shall arise; for this is not the case of a collateral contract, created by an endorsement. It may have some analogy to it, and so it has to an absolute guaranty or suretyship. This is a liability created, not merely by the act of the parties, but by the express terms of a Statute. The act of incorporation provides, "that if said corporation shall, at any time hereafter, divide their stock, previous to the payment of all their bills, or shall refuse or neglect to pay any of their bills, when presented for payment in the usual manner, the original stockholders, their successors, and assigns, and the members of such corporation, shall, in their private capacities, be jointly and severally liable to the holder of any bill or bills, issued by the said corporation for the payment thereof," etc., etc. I agree at once to the position, that the bills of the bank are to be considered originally as the debts of the corporation, and not of the corporators; and, except from some special provision by Statute, the latter cannot be made answerable for the acts or debts of the former. They are altogether in law distinct persons, and capable of contract with each other. But the corporators are not strangers to the corporation. On the contrary, the law contemplates a privity between them; and upon that privity has created an obligation on the corporators, under certain circumstances, to pay the debts of the corporation. Nothing can be better settled, than that an action of debt lies for a duty, created by the common law, or by custom. *A fortiori* it must lie, where the duty is

created by Statute. Mr. Justice BLACKSTONE says, "that every person is bound, and hath virtually agreed to pay such particular sums of money, as are charged on him by the sentence, or assessed by the interpretation of the law. Whatever, therefore, the law orders any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge." Without placing any reliance upon this refined notion of contract, it cannot be doubted, that the learned judge has expressed the true doctrine of the law. Whatever is enjoined by a Statute to be done, creates a duty on the party, which he is bound to perform. The whole theory and practice of political and civil obligations rests upon the principle. When, therefore, a Statute declares, that, under certain circumstances, a stockholder in a bank shall pay the debt due from the bank, and those circumstances occur, it creates a direct and immediate obligation to pay it. The consideration may be collateral or not; but it is not a subject-matter of inquiry. And to deny, that it is a duty on the stockholder to pay the money, is to deny the authority of the Statute itself; for a duty is nothing more than a civil obligation to perform that, which the law enjoins. Here, then, the law has declared, that the stockholders shall be liable to pay a specific sum, and it imposes on them a duty so to do. How then can the Court say, that debt does not lie, since there is a duty on the defendant to pay the plaintiff a determinate sum of money? There is no room, under this view of the case, for entertaining any question as to collateral undertakings. The law has created a direct liability, a liability as direct and cogent, as though the party had bound himself under seal to pay the amount; in which case debt would undoubtedly lie. The law esteems this an obligation created by the highest kind of specialty. Indeed, if debt would not lie in this case, it is inconceivable, how *assumpsit* could. There is no pretence of any express promise; and if a promise is to be implied, it must be because there exists a legal liability, independent of any promise sufficient to sustain one. Now, the very action of a collateral undertaking is, that there exists no legal liability, independent of the promise to create a duty. And if there exists a duty sufficient to raise a promise, then it is sufficient to sustain an action of debt. Upon the most mature reflection, I am of opinion, that an action of debt well lies in this case.

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UNITED STATES v. COLT.

*United States Circuit Court for the District of**Pennsylvania. 1818.**Peters' Circuit Court Reports, 145.*

This was an action of debt, brought upon an embargo bond, in the District Court, to June, 1811; and the declaration demanded twenty thousand dollars, which the defendant was alleged to owe and detain. It then recited the embargo law, laying the breach, by the defendant; "whereby the United States are entitled to demand a sum, not exceeding twenty thousand dollars, and not less than one thousand dollars, viz., twenty thousand dollars;" which it averred to be due to the plaintiffs and detained from them by the defendant. Upon *nil debet* pleaded, the jury found a verdict for four thousand dollars. The defendant took out a writ of error, returnable at April sessions, 1812, of the Circuit Court; and the case now came on for decision.

WASHINGTON, J.: The question in this case is, whether the action is maintainable. The objection to the action of debt, where the penalty is uncertain is, that this action can only be brought to recover a specific sum of money, the amount of which is ascertained. It is said, that the very sum demanded, must be proved; and on a demand for thirty pounds, you can no more recover twenty pounds, than you can a horse, on a demand for a cow. Blackstone says that debt, in its legal acceptation, is a sum of money due, by certain and express agreement; where the quantity is fixed and does not depend on any subsequent valuation to settle it; and for nonpayment, the proper remedy is the action of debt, to recover the specific sum due. So if I verbally agree to pay a certain price for certain goods, and fail in the performance, this action lies; for this is a *determinate contract*. But if I agree for no settled price, debt will not lie, but only a special action on the case; and this action is now generally brought, except in cases of contracts under seal, in preference to the action of debt; because, in this latter action, the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single

cause of action, fixed and determined; and which, if the proof varies from the claim, cannot be looked upon, as the same contract of which performance is demanded. If I sue for thirty pounds, I am not at liberty to prove a debt of twenty pounds, and recover a verdict thereon; for I fail in the proof of that contract, which my action has alleged to be specific and determinate. But *indebitatus assumpsit* is not brought to compel a specific performance of the contract; but is to recover damages for its nonperformance; and the damages being indeterminate, will adapt themselves to the truth of the case, as it may be proved; for if any debt be proved, it is sufficient.

+ The doctrine laid down by this writer, appears to be much too general and unqualified; although, to a certain extent, it is unquestionably correct. Debt is certainly a sum of money due by contract, and it most frequently is due by a certain and express agreement, which also fixes the sum, independent of any extrinsic circumstances. But, it is not essential, that the contract should be express, or that it should fix the precise amount of the sum to be paid. Debt may arise on an implied contract, as for the balance of an account stated; to recover back money which a bailiff had paid more than he had received; and in a variety of other cases, where the law, by implication, raises a contract to pay. 3 Com. Dig. 365. The sum may not be fixed by the contract, but may depend upon something extrinsic, which may be averred; as a promise to pay so much money as plaintiff shall expend in repairing a ship, may be sued in this form of action; the plaintiff averring that he did expend a certain sum. 2 Bac. 20. So, on promise by defendant, to pay his proportion of the expenses of defending a suit, in which defendant was interested, with an averment that plaintiff had expended so much, and that defendant's proportion amounted to so much. 3 Levy, 429. So an action of debt may be brought for goods sold to defendant, for so much as they were worth. 2 Com. Dig. 365. So debt will lie for use and occupation, where there is only an implied contract, and no precise sum agreed upon. 6 T. R. 63.

Wooddeson, 3d vol. 95, states, that debt will lie for an indeterminate demand, which may readily be reduced to a certainty. In *Emery v. Fell*, 2 Term Reports, 28, in which there was a declaration in debt, containing a number of counts for goods sold and delivered, work and labour, money

laid out and expended, and money had and received; the Court, on a special *demurrer*, sustained the action, although it was objected that it did not appear that the demand was certain, and because no contract of sale was stated in the declaration. But the Court took no notice of the first objection, and avoided the second, by implying a contract of sale, from the words which stated a sale. These cases prove that debt may be maintained upon an implied, as well as upon an express contract; although no precise sum is agreed upon. But the doctrine stated by Lord MANSFIELD, in the case of *Walker v. Witter*, Douglass 6, is conclusive upon this point. He lays it down, that debt may be brought for a sum capable of being ascertained, though not ascertained at the time the action was brought. ASHURST and BULLER say, that whenever *indebitatus assumpsit* is maintainable, debt is also. In this case two points were also made by the defendant's counsel; first, that on the plea of *nil debet*, the plaintiff could not have judgment, because debt could not be maintained on a foreign judgment; and secondly, that on the plea of *nil tiel record*, judgment could not be entered for the plaintiff, because the judgment in Jamaica was not on record. The court were in favour of the defendant, on the second point, and against him in the first; by deciding, that the debt could be maintained on a foreign judgment, because, *indebitatus assumpsit* might; and that the uncertainty of the debt demanded in the declaration, was no objection to the bringing of an action of debt. The decision therefore given upon that point, was upon the very point, on which the cause turned. But, independent of the opinion given in this case, is it not true, to use the words of BULLER, "that all the old cases show, that whenever *indebitatus assumpsit* is maintainable, debt also lies." The subject is very satisfactorily explained by Lord LOUGHBOROUGH, in the case of *Rudder v. Price*, 1 H. Bl. 550, which was an action of debt, brought on a promissory note payable by installments, before the last day of payment was past; in which the court, yielding to the weight of authority, rather than to the reason which governed it, decided; that the action could not be supported, because the contract being entire, would admit of but one action which could not be brought until the last payment had become due, although *indebitatus assumpsit* might have been brought. But his lordship was led to inquire into the ancient forms of action

on contracts; and he states, that in ancient times, debt was the common action for goods sold, and for work and labour done. Where *assumpsit* was brought, it was not a general *indebitatus assumpsit*; for it was not brought merely on a promise, but a special damage for a nonfeasance, by which a special action arose to the plaintiff. The action of *assumpsit*, to recover general damages for the nonperformance of a contract, was first introduced by *Slade's Case*, which course was afterwards followed. In the case of *Walker v. Witter*, BULLER also stated, that till *Slade's Case*, 4 Co. 92, b, a notion prevailed, that on a simple contract for a certain sum, the action must be debt; but it was held in that case, that the plaintiff might bring *assumpsit*, or debt at his election.

Thus it appears, that in all cases of contracts, unless a special damage was stated, the primitive action was debt; and that the action of *indebitatus assumpsit* succeeded, principally, I presume, to avoid the wager of law; which in *Slade's Case*, was one of the main arguments, urged by the defendant's counsel, against allowing the introduction of the action of *assumpsit*; as it thereby deprived the defendant of his privilege of wagering his law. BULLER seems therefore to have been well warranted in the case of *Walker v. Witter*, in saying: that all the old cases show, that where *indebitatus assumpsit* will lie, debt will lie. The same doctrine is supported by the case of *Emery v. Fell*, 2 T. R. 30, which was an action of debt, in which all the counts of *indebitatus assumpsit* are stated; where the objection to the doctrine was made and overruled. So in the case of *Harris v. Jameson*, 5 T. R. 557, ASHURST refers with approbation, to the opinion delivered in the case of *Walker v. Witter*. That debt may be brought for foreign money, the value of which the jury are to find, had been decided before the case of *Walker v. Witter*; as appears by the case of *Rands v. Peck*, Cro. Jac. 618, and in *Draper v. Rastal*, the same action was brought, though in different ways, for current money, being the value of the foreign.

Comyn in his Digest, Tit. Debt, p. 366, where he enumerates the cases in which debt will not lie, states no exception to the rule that where *indebitatus assumpsit* will lie, debt will lie, but one for the interest of money due upon a loan. But the reason of that, is explained by Lord LOUGHBOROUGH in the case of *Rudder v. Price*; who states, that un-

til the case of *Cook v. Whorwood*, upon a covenant to pay a stipulated sum of instalments, if the plaintiff brought assumpsit, after the first failure, he was entitled to recover the whole sum in damages; because he could not in that form of action, any more than in the action of debt, support two actions on an entire contract. Until that decision, the only difference between debt and *assumpsit* in such a case, was, that the former would not be brought, until after the last instalment was due; and in the latter, though it might be brought after the first failure, yet the plaintiff might recover the whole, because he could not maintain a second action on the same contract.

I proceed with the doctrine of Judge Blackstone before stated. After stating what constitutes debt, he observes, "that the remedy is an action of debt to recover the special sum *due*." It is observable, that he does not say, that the plaintiff is to recover the sum demanded, by his declaration; and no person will deny, but that he is to recover the special sum due.

After stating what constitutes a debt, and prescribing the remedy, Judge Blackstone proceeds to the evidence and recovery; and says, "the plaintiff must prove the whole debt he claims, or he can recover nothing." On this account he adds "the action of *assumpsit* is most commonly brought; because in that, it is sufficient if the plaintiff prove any debt to be due, to enable him to recover the sum, so proved, in damages." If this writer merely means to say, that where a special contract is laid in the declaration, it must be proved as laid; the doctrine will not be controverted. If debt be brought on a written agreement, the contract produced in evidence, must correspond, in all respects, with that stated in the declaration; and any variance will be fatal to the plaintiff's recovery. Such too is the law in all special actions in the case; but if Judge Blackstone meant to say, that in every case, where debt is brought on a simple contract, the plaintiff must prove the whole debt as claimed by the declaration, or that he can recover nothing; he is opposed by every decision, ancient and modern. The old cases before mentioned, in which debt was brought and sustained, are all cases, where it is impossible to suppose that the sum stated in the declaration, was or could in every instance be proved; any more, than it is, or can be proved, in actions of *indebitatus assumpsit*. They are in fact, actions substantially like to actions of *indebitatus assump-*

sit in the form of action for debt. The action of debt for foreign money, is and can be for no determinate sum; because the value must be found by the jury, either upon the trial of the issue, or upon a writ of inquiry, where there is judgment by default.

The case of *Sanders v. Mark*, is debt for an uncertain sum, in which the debt claimed, was for fifteen pounds eighteen shillings and six pence, and the defendant's proportion of the whole sum, was averred to be fifteen pounds eighteen shillings and eight pence; yet the action was supported. This is plainly a case, where the sum due could not be certainly averred; because the yearly value of the defendant's property might not be known to the plaintiff, and could only be ascertained, with certainty, by the jury. In the case of *Walker v. Witter*, Lord MANSFIELD is express upon this point. He says, that debt may be brought for a sum capable of being ascertained, though not ascertained at the time of bringing the action; and he adds, that it is not necessary that the plaintiff should recover the exact sum demanded. In the case of *Rudder v. Price*, Lord LOUGHBOROUGH, who has shed more light upon this subject than any other judge, says: that long before *Slade's Case*, the "demand in an action of debt must have been a thing certain" in its nature, yet, it was by no means necessary, that the "amount should be set out so precisely, that less could not be recovered."

In short, if before *Slade's Case*, debt was the common action for goods sold, and work done, it is more obvious, that it was not thought necessary to state the amount due, with such precision, as that less could not be recovered; for in those cases, as the same judge observes, "the sum due was to be ascertained by a jury, and was given in the form of damages." But yet the demand was for a thing certain in its nature; that is, it was capable of being ascertained, though not ascertained, or perhaps capable of being so, when the action was brought. Whence the opinion arose, that in an action of debt on a *simple contract*, the whole sum must be proved, I cannot ascertain. It certainly was not, and could not be the doctrine prior to *Slade's Case*; and it is clear, that it was not countenanced by that case. However, let the opinion have originated how it might; Lord LOUGHBOROUGH in the above case, denominates it an erroneous opinion, and says, that it has been some time since corrected.

In the case of *M'Quillen v. Cox*, the sum demanded was five thousand pounds; which was fifty more than appeared to be due by the different sums. The objection was made on a special *demurrer*, that the declaration demanded more than appeared by the plaintiff's own showing to be due. The court did not notice the alleged variance between the writ and declaration, or the misrecital of the writ; but overruled the *demurrer*, because the plaintiff might, in an action of debt on a simple contract, prove and recover a less sum than he demanded in the writ.

From this last expression it might be supposed, that the court meant to distinguish between the sum demanded by the writ, and that demanded by the declaration; but this could not have been the case, because the sum demanded by the writ, and that demanded by the declaration was the same; viz., five thousand pounds. There was, in fact, no variance; for, though the declaration recites the writ, yet the sum demanded, and which the declaration declared to be the sum which the defendant owed and detained, was the same sum as that mentioned in the writ; and the objection stated in the special *demurrer*, was made to the variance, between the sum demanded by the declaration, and the sum alleged to be due.

The distinction taken in the case of *Ingledon v. Cripps*, Salk. 659, runs through all the above cases, and appears to be perfectly rational; viz., that where debt is brought on a covenant, to pay a sum certain, any variance of the sum in the deed will vitiate. But, where the deed relates to matter of fact extrinsic, there, though the plaintiff demanded more than is due, he may enter a *remitter* for the balance. This shows, that debt may be brought for more than is due, and that the jury may give less; or of they give more than is due, the error may be corrected by a remitter.

Thus stands the doctrine in relation to the action of debt on contracts; and if debt will lie on a contract, where the sum demanded is uncertain, it would seem to follow, that it would lie for a penalty given by statute, which is uncertain, and dependent upon the amount to be assessed by a jury. For, when they have assessed it, the sum so fixed becomes the amount of the penalty given. This however stands upon stronger ground than mere analogy. The point is expressly decided in the case of *Pemberton v. Shelton*, Cro. Jac. 498. That was an action of debt brought upon

the first section of the statute, 2 Ed. 6. ch. 13; which gives the treble value of the title due, for not setting them out. The declaration claimed thirty-three pounds, as the treble value; and in setting forth the value of the tithes, the whole amount appeared to be more than one-third of the sum demanded; so that the plaintiff claimed less than the penalty given by the statute. Upon *nil debet* pleaded, the jury found for the plaintiff twenty pounds, and a motion was made in arrest of judgment, for the reason above mentioned. The court overruled the motion, upon the ground afterwards laid down in the case of *Ingledon v. Cripps*. They held, that there was a difference when the action of debt is grounded on a specialty, or contract, which is a sum uncertain; or upon a statute, which gives a certain sum for the penalty; and where it is grounded on a demand, when the sum is uncertain, being such as shall be given by the jury. In the former, it was agreed, that the plaintiff cannot demand less than the sum agreed to be paid or given by the statute; but in the latter, it is said, that if the declaration varies from the real sum, it is not material; for he shall not recover according to his *demand in the declaration*, but according to the verdict and judgment, which may be given for the plaintiff. It cannot be said, that this doctrine was laid down in consequence of the court considering this as a statutory action, to which it was necessary to accommodate the recovery, by changing general principles of law applicable to other cases; for it will appear, by a reference to the statute, that it prescribes no remedy for enforcing the penalty; and that debt was brought upon the common-law principle, that where a statute gives a penalty, debt may be brought to recover it. In this case the statute gives the action of debt, and I cannot perceive in what other form, than this one which has been adopted, the declaration could have been drawn. Had it claimed the smallest sum, it might have been less than the jury might have thought the United States entitled to recover; and yet, judgment could not have been given for more. I know of no precedent for a declaration in debt, claiming no precise sum to be due and detained, nor any principle of law, which would sanction such a form. On the other hand, I find abundant authority for saying, that the demand of one sum, does not prevent the recovery of a smaller sum, where it is diminished by extrinsic circumstances.

Rule discharged.

CROCKETT v. MOORE.

*Supreme Court of Tennessee. 1855.**3 Sneed, 145.*

Mr. Justice CARUTHERS delivered the opinion of the court:

This was an action of debt, brought upon an instrument executed by the defendant to the intestate of the plaintiff, in these words:

"Due James Hunter, eight hundred dollars, payable in good bar iron, at 6¼ cents a pound, it being for value received of him, this 24th day of April, 1841. Witness my hand and seal.

"Robert Crockett. (Seal.)"

Verdict and judgment in favor of the plaintiff, for the balance unpaid of the \$800, and interest. Motions for a new trial and in arrest of judgment overruled, and appeal in error to this court.

Several questions have been made and argued for a reversal.

1. It is contended that debt is not the proper action, but that it should have been covenant. Much vexation and perplexity have existed in the courts, here and elsewhere, in relation to the right form of action in cases of this kind.

* * *

But we think the action was well brought, according to our decided cases. There certainly is some appearance of conflict in the cases, which it would be useless now to attempt to reconcile. We understand the true rule in relation to these property contracts to be that when the contract, upon its face, or in its terms, furnishes the means of ascertaining the exact amount due for specific articles or services, debt will lie. *Langtree v. Walker & Polk*, 6 Humph. 336; *Marrigan v. Page*, 4 id. 247, 1 Meigs' Dig. If the contract before us be tested by this rule there can be no difficulty. The obligation is for \$800, payable in bar iron at 6¼ cts. per pound. There is no uncertainty here. The quantity of iron is 1,280 pounds, and its value is fixed by the contract; it can neither be more nor less; there

is nothing to test by proof; no room for the exercise of discretion in the assessment of damages. It would be different if the contract were for 1,280 pounds of iron. Then the recovery would be in damages to be ascertained by a jury, upon proof of its value on the day due. So, if the contract were for a horse, so much wheat, corn, or pork, the recovery would be in damages, or, as it is sometimes expressed, "sound in damages." In such cases debt will not lie. But in all these cases, if the price of the article be fixed in the contract, or if the contract be for a sum certain "to be paid," or "which may be paid," or "payable" in any kind of property, debt may be brought, because the sum to be recovered is certainly fixed by the parties to the contract, for a failure to pay the property, and there is no room for the assessment of damages. If a jury were to find less, or more, the court would set aside the verdict. The numerous cases maintaining this position are referred to and digested in 1 Meigs' Dig. 413. Upon first principles, as laid down in the elementary books, the proposition is equally clear. 3 Bla. Com. 154; 1 Chit. 100; 2 Bac. Abr. 279. The principle is, that where the amount to be recovered is specific and fixed, and does not depend upon any valuation or assessment to fix it, debt may be brought. But where a contract for specific articles or performance of services does not specify the value in money of such articles or services, but the same has to be ascertained by a resort to extraneous evidence by the tribunal before which suit is brought, the action cannot be debt.

* * * * *

Finding no error in the judgment, we affirm it.⁴⁰

40. In *Butcher v. Carlile* (1855) 12 Leigh (Va.) 520, will be found a full discussion of the proper form of action in these property contracts, in which statements are made which are somewhat at variance with those above given, but the niceties of the subject are of comparatively slight importance and do not seem to call for an extended treatment here. The theory under which debt may be sustained, as presented in the case given above, seems satisfactory and in harmony with the general theory of the action.

SECTION 9. COVENANT.⁴¹

JEROME v. ORTMAN.

*Supreme Court of Michigan. 1887.**66 Michigan, 668.*

CAMPBELL, C. J.: In this case the plaintiffs sued defendants in an action of covenant for the violation of the terms of an agreement which was executed without any actual seal or scroll, but which was declared to be the act of the parties, in witness whereof they thereunto set their hands and seals. The court below held that the action of covenant was properly brought, and judgment was rendered upon the verdict of the jury for damages shown.

It is claimed now by defendants that, the agreement not being actually sealed, *assumpsit* was the only action permissible; and *assumpsit* being barred in six years, while covenant is not barred until ten years, the distinction is material and vital in the present case, where more than six years had expired.

We have no statutory definition either of a covenant or of the action of covenant. We must therefore go back to

41. DECLARATION IN COVENANT. "For that whereas, heretofore, to wit, on the — day of —, A. D. —, at, etc. by a certain indenture then and there made between the said A B of the one part, and the said C D of the other part (the counterpart of which said indenture sealed with the seal of the said C D, the said A B now brings here into court, the date whereof is the day and year aforesaid), the said A B did demise, lease, set and to farm let unto the said C D, his executors, administrators and assigns, a certain messuage or dwelling house, etc. situate, etc. to have and to hold the said messuage or dwelling house, etc. with the appurtenances, unto the said C D, his executors, administrators, and assigns, from the — day of —, then last past, to the full end and term of — years thence next ensuing, and fully to be complete and ended. Yielding and paying therefor yearly and every year, to the said A B, his heirs or assigns, the clear yearly rent or sum of — £ payable quarterly, at the four most usual feasts or days of payment of rent in the year (that is to say), on the 25th day of March, the 24th day of June, the 29th day of September and the 25th day of December, in each and every year, by even and equal portions. And the said C D did thereby for himself, his executors, administrators and assigns, covenant, promise and agree, to and with the said A B, his heirs and assigns, that he the said C D, his executors, administrators or assigns, should and would well and truly pay, or cause to be paid, to the said A B, his heirs or assigns, the said yearly rent or sum of — £ at the several days and times aforesaid. As by the said indenture reference being hereunto had will (amongst other things) more fully and at large appear. By virtue of which said demise, the said C D afterwards, to wit, on, etc.

the common law, It is claimed by defendants that a covenant is an instrument under seal, and that the action of covenant is confined to sealed instruments.

This was generally so at common law, but the definition is not accurate in the order of statement. Covenant at common law is an action upon a deed. It is only because a deed at common law required a seal that covenant has been declared to lie upon a covenant or agreement under seal. It is the question whether the instrument was a deed or not that governs. All sealed instruments are deeds. But even at common law a party could be held sometimes where he had not affixed his own seal at all. Thus the lessee in a king's patent might be sued for covenant broken, although he sealed no counterpart, because bound by his acceptance. Com. Dig. "Covenant," Al. And in a lease to two persons, one only of whom sealed the counterpart, the same doctrine was laid down. Id., Co. Litt. 231a. Several other cases are put in Comyn to the same effect. Implied covenants, before our statutes on the subject, came under this rule.

In Fitzherbert's *Natura Brevium*, 146A, where the writ of covenant is explained, it is said that by the custom of London covenant would lie without deed. And the same customary exception appears to have existed elsewhere. Com. Dig. Id.

It is declared by our statute (How. Stat. Par. 7778) that no bond, deed of conveyance, or other contract in writing,

entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof, for the said term so to him thereof granted as aforesaid. And although the said A B hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said indenture, to wit, at, etc. aforesaid. Yet protesting that the said C D hath not performed, fulfilled or kept, anything in the said indenture contained on his part and behalf, to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof, the said A B saith, that after the making of the said indenture, and during the said term thereby granted, to wit, on, etc. at, etc. aforesaid, a large sum of money, to wit, the sum of — £. of the rent aforesaid; for — years and a half of the said term then elapsed, became, and was, and still is in arrear and unpaid, to the said A B, contrary to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant of the said C D, by him in that behalf, so made as aforesaid, to wit, at, etc. aforesaid. And so the said A B in fact saith, that the said C D (although often requested so to do) hath not kept his said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the said A B hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said A B of — £. and therefore he brings his suit, etc." 2 Chitty on Pleading, 192.

signed by any party, his agent or attorney, shall be deemed invalid for want of a seal or scroll affixed thereto by such party.

At common law the seal alone was the test of the existence of a deed. Our statutes contemplate a signature as equally necessary. The statute just referred to indicates that some other thing than a seal may be considered, and this can only be the intention of the parties as found in the instrument itself, and the purpose it was intended to serve.

There can be no doubt what the agreement before us means. It uses the word "covenant" throughout to indicate what agreement the parties were making, which involved the sale and conveyance of lands when paid for. It was provided that the covenants should bind the heirs of the respective parties, as well as their representatives; and it recited that the parties thereunto set their hands and seals.

This language, and the whole contract taken together, cannot be construed as intending anything else than what would have been an agreement under seal or deed at common law. It is apparent that the failure to seal was inadvertent. It is the precise case intended by the statute, where an instrument purporting to be a deed is not sealed. There is no ambiguity in the expressed intention.

The statute is in harmony with the general policy of our law, which does not require any particular method of sealing, and permits anything to be called a seal which is adopted for that purpose. It does not put specialties and simple contracts on the same footing, but it allows parties who intend to make specialties to have their intent carried out. In a case so plain as the one before us, there is no occasion for prolonged discussion. The paper purports to be a deed, and is a deed.

*The judgment must be affirmed.*⁴²

42. HISTORY AND SCOPE OF THE ACTION. "Covenant lies to recover damages for the breach of a sealed promise (covenant) to do some particular act. 'Covenant lies when a man covenants with another by deed to do something and does it not; or that he has done it, when it is not done.' [Com. Dig. *Covenant*.] This remedy is the exact analogue of *assumpsit*, the only difference between the two actions being that the latter action lies for the breach of a simple promise, while covenant is maintainable only upon a specialty.

"It must not be imagined that the requirement of a seal distinguished the engagement of covenant in its early stages. The first covenants were

merely promises to do or to refrain from doing a particular thing, and the engagement was based simply upon the agreement or convention of the minds of the respective parties. Neither a consideration, nor a writing, nor a seal was deemed to be a material requisite in its make-up. Such being the broad notion at first embodied in the covenant, it is to be surmised that the king's courts would be rather slow in admitting its legal validity. Such we find to have been the case. * * *

"The writ was undoubtedly originally confined to covenants concerning tenements. It was the chief, if not sole, remedy of the lessee as against his lessor, and was strictly an action upon a lease. From the tenor of the writ it would be surmised that specific performance of the covenant was always granted; but evidently this could only be done when the covenant concerned realty or specific chattels. Where the covenant was in fact capable of being specifically enforced, either movables or immovables could be recovered. Where the covenant was purely personal, only damages could be awarded; for the king's court it seems, did not exercise that power of personal coercion which at a later period was exercised by the court of chancery.

"Although the plaintiff in a writ of covenant might recover specific property where such was the subject-matter of the covenant, it did not follow that the action was a proprietary remedy like detinue, or possessory like the assizes. It was conceived to be founded purely on the obligation created by the contract.

"Bracton, writing near the middle of the thirteenth century, observed that the covenant was then acquiring some sort of standing in the king's courts. It would have been impossible in his day to lay down any general principle by which the validity of a particular covenant could be determined; for no general limitation as regards either the form or the subject-matter of the engagement had as yet been imposed upon it. All that he could safely say was that the courts might enforce a covenant as a matter of favor. * * *

"The principle that the covenant must be in writing under seal was settled by the close of the reign of Edward I. This rule first appeared, of course, as a mere rule of evidence. How must the plaintiff in the writ prove his covenant? Is the *secta* sufficient, or must there be a writing? Good reasons for an affirmative answer to this latter question can no doubt be given. The *secta* as a mode of proof was rapidly falling into disrepute. [See Thayer on The Older Modes of Trial, 5 Harvard Law Review, 47 *et seq.*, showing that the *secta* were merely supporters of the plaintiff's case in advance of any answer of the defendant, to give it preliminary standing, and were not proof-witnesses.—Ed.] Jury in the modern sense there was none. As a consequence legal machinery was wholly unequal to the task of sifting human testimony and arriving at the truth concerning a disputed verbal agreement. Truly it would have been a dangerous innovation had the king's courts decided in Edward's day to meddle with all sorts of covenants. Considerations of this nature were decisive, and accordingly the courts imposed the condition that the covenant must appear in a sufficiently solemn form to preclude dispute as to the terms of the promise. Thereafter the making of a contract in this form required technical learning and the service of a clerk.

"The requirement of a writing (and in this period writing meant a sealed instrument) is the only condition that has ever been imposed on the covenant." 3 Street on Foundations of Legal Liability, 114-118.

McVOY v. WHEELER.

*Supreme Court of Alabama. 1837.**6 Porter, 201.*

Action of covenant. Plaintiffs declared against defendant, in a plea of covenant broken; for that, whereas, on a day certain, by an indenture made between the plaintiffs of the one part, and the defendant of the other part, (which indenture, sealed with the seals of the said parties, the plaintiffs brought into court) the said plaintiffs, in consideration of a large sum of money, to be paid as thereafter mentioned, agreed with defendant, that James Wheeler and Levi C. M'Cormick, should, within the space of five months, from the first day of April then next, erect and build two three-story brick buildings, to be located at the corner of Dauphin and St. Joseph streets, in the city of Mobile, according to a plan drawn by Thomas Ellison, (which the plaintiffs brought into court)—the said buildings to be completed according to a certain description of dimensions, by specifications, and of materials, therein particularly set forth. * * * In consideration whereof, the defendant covenanted and promised to and with the plaintiffs, well and truly to pay or cause to be paid, to the said Wheeler and M'Cormick, the sum of eight thousand and six hundred dollars, in the manner and at the periods following, to wit: two thousand dollars, on putting up the joists of the second floor; two thousand, as soon as the buildings should be covered; and two thousand and three hundred as soon as the buildings should be completed, according to the stipulations. * * *

And plaintiffs, in fact said, that said Wheeler and M'Cormick did build and finish the said two three-story brick buildings at the place described, according to the drawing and plan by the specifications, of the dimensions, and of the materials set forth in the indenture, (except as would be thereafter mentioned) the whole work being of materials of good quality, and suitable condition, executed in a faithful workman-like manner, and in full conformity with the said stipulations. But at divers times, previous to the first day of September, eighteen hundred and thirty-

five, the said Wheeler and M'Cormick, did, at the special request of the said defendant, make divers alterations in the said plan, to wit, in the hangings of the windows, in paving the kitchens, in the making of extra windows, and of fansashes for doors, and other alterations and deviations from said indenture. And the said defendant did, after the said first day of September, order the lower story of the said buildings to be finished for the purpose of a public house, closets to be made, the windows of the third stories to be cased, and the apartments thereof to be finished, lathed and plastered, together with other improvements not provided for by the said indenture—all of which the said Wheeler and M'Cormick performed.

And the plaintiffs averred, that the said Wheeler and M'Cormick did complete said buildings (including the additions aforesaid) in faithful and substantial compliance with the stipulations of said indenture, as soon as they could be completed, after the said first day of September, to wit, on or before the first day of December, thereafter; and the defendant received them, and was then, and had been, for a long time, in the full possession and enjoyment of them, and of the rents and profits arising therefrom. Yet defendant had not paid said last mentioned sum of twenty-three hundred dollars, last above mentioned.

Defendant craved oyer of the said supposed covenant, and it was read to him, and he demurred to the declaration generally, etc. * * *

* * * * *

And afterwards, to wit, at June term, eighteen hundred and thirty-six, came the parties, and the demurrer of said defendant, to the plaintiffs' declaration being understood by the court, it was considered by the court, that the demurrer should be overruled. * * *

COLLIER, C. J.: Several questions were raised in the circuit court, upon the demurrers to the declaration and pleas, which were so disposed of, as to make it necessary for an issue of fact to be tried by the jury, who found a verdict for the plaintiffs, on which judgment was rendered. At the trial, a bill of exceptions was taken by the defendant below, who prosecutes a writ of error to this court, and assigns the judgment on the demurrers, and the decision of the court excepted to, as causes for reversal.

We shall only consider the sufficiency of the declaration, which presents the question, whether an action of covenant will lie upon an agreement under seal, (to perform certain work) which has been modified, or the time of performance enlarged by parol.

Covenant can only be maintained upon a writing under seal. If a contract be unattested by a seal, or is unwritten, the action by which redress can be had, for a nonperformance, is debt or *assumpsit*, or either, according to the subject-matter. If new terms are introduced into a contract, other duties imposed, or another day provided for its consummation, it is clear, that the original contract does not remain unimpaired, so that an action would lie for a breach of its stipulations.—If then, no action could be maintained upon the original contract, when thus modified, we think it follows, that the present action is misconceived. For though the modifications, are set out in the declaration, yet they are to be shown by *parol*, and can not, according to the premises, we have assumed, be made the basis, either in whole or in part of an action of covenant.

The case of *Littler v. Holland*, 3 T. R. 590, was an action of covenant, upon an agreement under seal, to build two houses by a certain day. It appeared on the trial, that the time of performance was enlarged by parol, and that the houses were built within the enlarged time. This evidence, it was held, did not support the allegation in the declaration, and the plaintiff was nonsuited.

* * * * *

In *Philips et al. v. Rose*, 8 Johns. 392, the plaintiff agreed to build an oil mill within a prescribed time, which was enlarged by parol, and the work completed within the enlarged time. The court held that evidence of the enlargement would not support the declaration. And in *Jewell et al. v. Schroepfel*, 4 Cow. 565, the court consider the law as settled, “that the plaintiffs, inasmuch as they had not performed, within the time stipulated, by the original contract, could not recover upon the covenants contained in it. They could not, in such an action, give evidence of an extension of the time.”

In *Langworthy v. Smith*, 2 Wend. 587, the Supreme Court of New York reaffirm the previous decisions of that court, on the point, and consider it as beyond doubt, that a parol agreement to enlarge the time for the performance of cove-

nants, is good; and that by an enlargement, the remedy upon the covenant itself, is lost, and must be sought upon the agreement enlarging the time of the performance.

In the case at bar, the declaration shows that the contract was so materially varied, and the labor of the defendants so greatly increased, that they could not perform it until several months after the expiration of the day therefor appointed. It will, therefore, follow that the action cannot be maintained, and that the plaintiffs must resort to their remedy upon the parol agreement; making the covenant, so far as material, inducement to the action.

The judgment is reversed.

TAYLOR v. WILSON.

Supreme Court of North Carolina. 1844.

5 Iredell Law, 214.

This was an action of covenant on the following instrument executed by the defendant's testator to the plaintiff:

"To all to whom these presents shall come: I, William Wilson, of the county of Northampton, and State of North Carolina; Know ye that I, the said William Wilson, for, and in consideration of the natural love and affection which I have and bear unto my friend, Richard W. Taylor, of the county and State aforesaid, and for divers other good causes and considerations me hereunto moving, have given and granted, and by the presents do give and grant unto the said Richard W. Taylor, to take effect after my death, the sum of five hundred dollars, to have, hold and enjoy all and singular the said sum of five hundred dollars aforesaid, unto the said Richard W. Taylor, his executors, administrators and assigns, to the proper use and behoof of him the said Richard W. Taylor, his executors, administrators and assigns forever. And I, the said William Wilson, all and singular the aforesaid sum of five hundred dollars, to take effect at my death aforesaid, to the said Richard W. Taylor, his executors, administrators and assigns against all persons whatsoever, shall and will warrant and forever defend by these presents. In witness

whereof, etc. Dated the 23d of January, 1837, and signed and sealed by William Wilson.

The said Wilson died sometime before this suit was brought, having made a will in which he appointed an executor, who refused to qualify, whereupon the defendant was appointed administratrix with the will annexed. On the trial it was urged, that no recovery could be had on the instrument in question. The jury, under the instructions of the court, returned a verdict for the plaintiff. Judgment having been rendered pursuant to this verdict, the defendant appealed to the Supreme Court.

DANIEL, J.: * * * Secondly, it is said, that debt and not covenant is the proper remedy, if it is to be considered as a contract for money. The answer we give is, that debt and covenant are concurrent remedies for the recovery of any money demand, when there is an express or implied contract in any instrument under seal to pay it; but in general, debt is the preferable remedy, as in that form of action the judgment is final in the first instance, if the defendant do not plead; see 2 Stephens N. P. 1057. The judgment must be affirmed.⁴³

Judgment affirmed.

43. This was not the ancient rule. Pollock and Maitland, speaking of the development of this action, say that after the Statute of Wales, 1284, a limitation "soon becomes apparent, and it is a very curious one. The action of covenant cannot be employed for the recovery of a debt, even though the existence of the debt is attested by a sealed instrument. * * * The law is economical; the fact that a man has one action is a reason for not giving him another." 2 History of English Law, 217.

And Ames, in his History of *Assumpsit*, says: "Strange as it may seem, covenant was not the normal remedy upon a covenant to pay a definite amount of money or chattels. Such a covenant being regarded as a grant of the money or chattels, debt was the appropriate action for their recovery. The writer has discovered no case in which a plaintiff succeeded in an action of covenant, where the claim was for a sum certain, antecedent to the seventeenth century; but in an action of debt upon such a claim, in the Queen's Bench, in 1585, 'it was holden by the court that an action of covenant lay upon it, as well as an action of debt, at the election of the plaintiff.' [Anon., 3 Leon. 119.] The same right of election was conceded by the court in two cases in 1609, in terms which indicate that the privilege was of recent introduction." 2 Harvard Law Rev. 56.

SECTION 10. ASSUMPSIT.⁴⁴(a) *Special Assumpsit.*⁴⁵

CALDBECK v. SIMANTON.

*Supreme Court of Vermont. 1908.**82 Vermont, 69.*

Case for false warranty. Plea, the general issue. Trial by jury at the June Term, 1907, Caledonia County, MILES, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. During the trial, before the plaintiff rested, and again at the close of all the evidence, the defendant moved to dismiss the case because the action is founded on contract, and the writ was issued as a

44. "This action is so called from the word *Assumpsit*, which, when the pleadings were in Latin, was always inserted in the declaration as descriptive of the defendant's undertaking. It may be defined to be an action for the recovery of *damages* for the nonperformance of a parol or simple contract, or, in other words, a contract not under seal nor of record, circumstances which distinguish this remedy from others; for the action of debt is, in legal consideration, for the recovery of a debt *eo nomine*, and *in numero*, and is most frequently brought upon a deed, and the action of covenant, though in form for the recovery of damages, can only be supported by a contract under seal. *Assumpsit*, however, is not sustainable unless there have been an express contract or unless the law will imply a contract." 1 Chitty on Pleading (6th London Ed.) 98.

45. DECLARATION IN SPECIAL ASSUMPSIT. "For that whereas, heretofore, to wit, on, etc. at, etc. in consideration that the said A B being then and there *sole* and unmarried, at the special instance and request of the said C D, had then and there undertaken, and faithfully promised the said C D to marry him the said C D, he the said C D undertook, and then and there faithfully promised the said A B to marry her the said A B, and the said A B avers, that she, confiding in the said last-mentioned promise and undertaking of the said C D, hath always from thence hitherto remained and continued, and still is, *sole* and unmarried, and hath been, for and during all the time last aforesaid, and still is, ready and willing to marry him the said C D, to wit, at, etc. aforesaid, and although a reasonable time for the said C D to marry the said A B hath elapsed since the making of the said last-mentioned promise and undertaking last aforesaid. And although the said A B, after the making of the said last-mentioned promise and undertaking of the said C D, to wit, on, etc. at, etc. aforesaid, requested the said C D to marry her the said A B, yet the said C D not regarding his last-mentioned promise and undertaking, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said A B in this respect, did not, nor would, at the said time when he was so requested, as last aforesaid, or at any time before or afterwards, marry the said A B, but on the contrary thereof, he the said C D at the said time when he was so requested as last aforesaid, wholly refused then or ever to marry her the said A B, to wit, at, etc. aforesaid. To the damage, etc." 2 Chitty on Pleading, 91.

capias and the defendant's body arrested thereon. The motion was overruled, and the defendant excepted.

MUNSON, J.: The plaintiff declares in substance that he bargained with the defendant for the purchase of a diamond, and that the defendant sold him the diamond for a certain price by "falsely and fraudulently warranting" it to be a perfect stone, when in fact it was not a perfect stone, but defective in certain respects stated; and that the defendant thereby "falsely and fraudulently deceived him." The service was by arrest, and the case stands on a motion to dismiss. The defendant argues that no scienter is alleged, that the declaration is in case for a breach of warranty, and there could be no recovery without proving the warranty, and that this conclusively determines that the action is founded on contract. * * *

* * * * *

Personal actions are either for breaches of contract, or for wrongs unconnected with contract; *assumpsit* being in the first class, and case in the second. Chitty 97. The original action on the case, permitted in suits for which the established forms were not adapted, was not similar to the present action of *assumpsit*, but resembled rather the present form of a declaration in case for a tort. Chitty 99. It was at first difficult to distinguish *assumpsit* from case; and the early decisions in actions on warranties were made before the boundary between the two remedies was well defined. Note to *Chandelor v. Lopus*, 1 Smith Lead. Cas. 178. The practice of declaring in tort for warranty broken originated in this early period; and the remedy then adopted continued in almost exclusive use until the middle of the eighteenth century. As late as 1778, Lord MANSFIELD considered an action of *assumpsit* for a breach of warranty so peculiar that he reserved the question of its sufficiency; and this method of declaring was then authoritatively sanctioned. *Stuart v. Wilkins*, 1 Doug. 17. Since then *assumpsit* and case have been recognized as concurrent remedies for breach of warranty. *Williamson v. Allison*, 2 East. 446; *Beeman v. Buck*, 3 Vt. 53; 19 Enc. Pl. and Pr. 82 and cases cited.

Closely connected with the subject of warranty is that of deceit and fraudulent representations. The two grounds of liability are entirely distinct, but both may be developed

by one affirmation. The evidence may make the affirmation either a deceit or a warranty or both. * * *

* * * * *

The recognition of *assumpsit* and case as concurrent remedies for breach of warranty, and the decision in *Williamson v. Allison* regarding the *scienter*, have led to the adoption of forms confessedly designed to enable the plaintiff to recover for a breach of warranty or for deceit, as the case might develop. A short declaration, framed in this double aspect, was used in *Beeman v. Buck*, 3 Vt. 53, 21 Am. Dec. 571; *Vail v. Strong*, 10 Vt. 457; *West v. Emery*, 17 Vt. 583, 44 Am. Dec. 356; *Goodenough v. Snow*, 27 Vt. 720; and *Pinney v. Andrus*, 41 Vt. 631. This declaration, given in full in the case first cited, avers that the defendant deceitfully sold the property by warranting it to be as described, "well knowing" it to be otherwise. * * * This form was followed in *Harlow v. Green*, 34 Vt. 379, and was apparently the basis of the declaration in *Whitton v. Goddard*, 36 Vt. 730. The direct allegation of knowledge contained in the phrase "well knowing" or its equivalent, is ordinarily employed in declarations which claim a recovery on the ground of deceit, and its absence from the declaration used here is the basis of the defendant's claim.

* * * * *

But the precise question has been adjudged in this State, although without special consideration. In *Foster v. Caldwell's Est.*, 18 Vt. 176, the declaration alleged in substance that the deceased sold the plaintiff a number of sheep by falsely and fraudulently warranting them to be sound when in fact they were diseased, and that the deceased deceived the plaintiff in the sale; but there was no allegation that the deceased knew the sheep were unsound. The verdict taken was in tort, and the court allowed it to be amended, after the panel was dismissed, by striking out the words "is guilty," and inserting the words "did assume and promise." In sustaining the action it was said: "There is no allegation of a scienter in the declaration, and consequently there can be no recovery * * * for a deceit, notwithstanding the declaration is, in form, in case for a false warranty."

* * * * *

The phraseology of our standard forms reflects the indefiniteness of distinction which prevailed in the formative

period of the common law, and this is true to some extent of the language of commentators comparatively modern. Blackstone, writing about 1758, after speaking of the beating of another and the taking of another's goods as trespasses, proceeds: "So also, nonperformance of promises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded." The subject may be briefly reviewed and further elucidated in the words of the note to *Chandelor v. Lopus*, 2 Smith's Lead. Cas. 187, Am. ed. 1847, where it is said in connection with a consideration of *Williamson v. Allison* and kindred cases: "Originally actions upon breaches of warranty, as well as of all other promises, were substantially, as well as nominally, actions on the case, which went upon the ground of deceit, and set forth the undertaking of the defendant, and the consideration by which it was supported, for the purpose of establishing a fraud on his part, and a consequent legal injury to the plaintiff. But in modern times the distinction between *assumpsit* and case has become as well established as that between trespass and covenant, and it is not easy to see why it should be disregarded in the single instance of actions such as those we have just been considering." It may also be said that there is no plainer distinction in the law than that between breach of warranty and deceit; and the law no more implies deceit from a breach of warranty than it does from a breach of covenant for title or from the nonperformance of a contract of suretyship.

The difference between *assumpsit* and case as remedies for wrongs of this character was comparatively of little importance when our earliest cases upon the subject were decided. The subsequent abolishment of imprisonment for debt has introduced an element which cannot be ignored in reviewing the subject at this date. It is not necessary to consider further the construction, technicalities and classification of the different forms employed, nor to anticipate the questions of practice that may arise in connection with their use. It is enough to say that if a plaintiff wishes to proceed by arrest he must allege a case that entitles him to arrest. That right cannot be given by mere form or classification. The test must be in the nature of the action as determined by its substance. It is said in *Beeman v. Buck*, 3 Vt. 53, 21 Am. Dec. 571, that *assumpsit* is supported by

proof of the sale, a warranty, and the breach of it, and that nothing more is required in tort. If the declaration in tort requires the same and only the same proof as the one in *assumpsit*, it is manifestly a declaration in tort only in name. The declaration before us is so framed that nothing more is required. It discloses a warranty false in fact, but not false to the knowledge of the warrantor. If the plaintiff recovers upon this declaration it will be solely by force of the contract. Proof of fraud was not pertinent to the issue presented.

* * * * *

~~Judgment reversed, motion to dismiss sustained, and writ dismissed.~~⁴⁶

46. The delictual origin of *assumpsit* has been demonstrated by several writers: "The gist of the action," says Ames in his History of Assumpsit, 2 Harv. L. R. 14, was "the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or other property." It was merely an action on the case for deceit, and only by slow degrees did it develop into a non-tortious action.—See 3 Street on Foundations of Legal Liability, 178. The declaration in *assumpsit* describes the action as "trespass on the case upon promises.—Carroll v. Green (1875) 92 U. S. 513.

THOMPSON v. FRENCH.

X

Supreme Court of Tennessee. 1837.

10 Yerger, 453.

Mr. Justice TURLEY delivered the opinion of the court.

This is an action of debt brought by the defendant in error to recover compensation for services rendered the plaintiff's intestate in his lifetime, as a general superintendent of his property and business. The declaration contains the *indebitatus* count for work and labor done, and a count upon a *quantum meruit* for the same services. The pleas are *nil debet* and the statute of limitations. The jury found a verdict for the defendant in error, upon which the court gave judgment, and to reverse which this writ of error is prosecuted.

The proof shows abundantly that Wm. P. French, the plaintiff in the circuit court, was assiduously engaged in attention to the business of Thomas Hopkins, the intestate,

almost continually from the year 1821 to the year 1836, but without any special contract as to the amount or nature of the compensation to be given therefor, and out of this the first cause of error is assigned, viz., that the action of debt is not the proper remedy, because, 1st, the damages being unliquidated and uncertain, the proper remedy is *assumpsit*, and not debt; and, 2nd, the action is not maintainable against an administrator upon the simple contract of his intestate, by the principles of the common law.

That the actions of debt and *indebitatus assumpsit* are concurrent remedies in case of simple contracts for the payment of money, either express or implied, has been so repeatedly held that it is deemed unnecessary to enter into an examination of the authorities in support of the proposition, and we are satisfied with a reference to the case of *Hickman v. Searcy's Executor*, 9 Yerg. 47, where this point is expressly so adjudicated by this court.

That *indebitatus assumpsit* is a proper remedy to recover compensation for work and labor done cannot be denied—indeed (if the action of debt be not proper), it is the only remedy where the amount of compensation has not been ascertained by express agreement, for no special count in *assumpsit* can be framed upon a promise arising by implication of law. The special counts in *assumpsit* are given to recover damages for the nonperformance of contracts specially entered into, and whether the consideration be executed or executory makes no difference. The common counts are founded on express or implied promises to pay money in consideration of a precedent and existing debt, and in general the consideration must have been executed, not executory, and the plaintiff must have been entitled to payment in money. 1 Chit. Pl. 373. So, that the *indebitatus* count in *assumpsit* is no more the proper remedy to recover unliquidated damages arising from the nonperformance of a special contract than would be the action of debt. (But it is said that the action of debt will only lie for a sum which is certain, or is capable of being readily reduced to a certainty.) This, as a general principle, is true, but, extended to the length to which it is sought to be carried, would be entirely subversive of the action of debt as a remedy upon simple contracts, where the amount to be paid has not been ascertained by express agreement, or would make the right to use it depend, not upon legal principles,

but upon the nature and character of the proof to be adduced upon the trial, and the ease or difficulty with which the value of services performed or the goods delivered could be ascertained thereby. It is not denied that the action will lie for goods, wares, and merchandise sold and delivered, and for work and labor done, although there be no express agreement as to the amount to be paid. This court cannot, therefore, say that the test is the difficulty of ascertaining the value of the goods sold and delivered, and the work and labor done, because they may be of a kind and character about which men may well differ in opinion.

It is not to be denied that there is some confusion produced in the books, relative to the use of this action, by the employment of such terms as "*eo nomine*" "*in numero*," and "unliquidated damages." But it is well settled that, although a specific sum must be demanded in the declaration, a less may be recovered, and that although in all cases of goods, wares, and merchandise sold and delivered, and of work and labor done, where the law implies the promise because the consideration is executed, the damages are of necessity unliquidated, yet the action is maintainable. But this confusion is produced either by loose use of the phrases or by giving them an improper construction. By "*eo nomine*" and "*in numero*" is only meant that a specific sum is sought to be recovered which is improperly detained, and that the action does not sound in damages as does the action of *assumpsit*, thus drawing the proper line of demarcation between them, as applicable to contracts of the character under consideration. By the words "unliquidated damages" is manifestly meant (if there be any meaning in what is most unquestionably a very loose use of words) such damages as are sustained by the nonperformance of an executory contract, which cannot be considered as a money demand, and the amount of which may depend upon such a variety of considerations and circumstances as to render it exceedingly difficult to be ascertained. To illustrate it by an example, suppose a contract for the building of a house, which is not performed, or performed in a manner different from the contract, the damages sustained are "unliquidated," and such as are not readily reduced to a certainty, and for which neither *indebitatus assumpsit* nor debt will lie.

The principle, then, established by us is this: That in all cases where the consideration has been executed, and where there is an express or implied promise to pay in money the value thereof, *indebitatus assumpsit* or debt is the proper remedy. But that in all those cases where the consideration is not executed, or, if it be, and the promise to be performed in consideration thereof is not to pay in money, but to do some other thing, that neither *indebitatus assumpsit* no debt will lie and that the remedy is by a special action on the case.

* * * * *

Upon the whole, we think there is no error in the rendition of the judgment in the court below, and direct its affirmance.

Judgment affirmed.

NORTH v. NICHOLS. ✓

Supreme Court of Errors of Connecticut. 1870.

37 Connecticut, 375. *sit*

Assumpsit for rent of leased premises; brought to the Superior Court in Fairfield county, and tried to the jury, on the general issue, before GRANGER, J. * * *

PARK, J.: * * *

The action was brought to recover the rent of certain premises situated in the city of New York, from the first day of July, 1867, to the first day of October of the same year. The rent had accrued by virtue of a certain lease of the premises in writing, under seal, in which there were mutual covenants to be performed by the parties thereto, and executed by the defendants, as the party of the second part, and one John H. Glover as the party of the first part.

* * * * *

This contract prescribes the amount of rent to be paid, and the times when payment should be made, and if the defendant failed to pay the rent in controversy he failed to pay it according to the terms of the written lease.

If this is so the plaintiff cannot sustain his action of *assumpsit*, for that action will not lie where the cause of action arises upon a contract under seal. - *covenant*

Judge SWIFT, in the first volume of his Digest, on the 574th page, says, in commenting upon the action of *assumpsit*, "It will not lie upon contracts under seal, or by record, which distinguishes it from debt and covenant." This is saying, in other words, that *assumpsit* will not lie where the subject-matter in controversy arises upon a contract under seal. So, also, upon the 417th page, he says that "where there is a deed under seal, containing a covenant to pay the rent, the action must be either covenant or debt." This is precisely the case under consideration. So also upon the 576th page, he says, "Where a party has a security of a higher nature, he must found his action thereon; and as the law has prescribed different forms of action on different securities, *assumpsit* cannot be supported where there has been an express promise under seal or of record; but the party must proceed in debt or covenant where the contract is under seal." The following authorities are equally explicit and to the same effect. 1 Chitty on Pleading, 98, 344; *Barry v. Ryan*, 4 Gray, 523; *Brewer v. Dyer*, 7 Cush., 337; *Codman v. Jenkins*, 14 Mass. 93.

* * * * *

⧿ BOSTON INDIA RUBBER FACTORY v. HOIT.

Supreme Court of Vermont. 1842.

14 Vermont, 92.

Assumpsit upon a judgment of the supreme judicial court of Massachusetts. The defendant demurred to the declaration and the county court adjudged it insufficient. The plaintiffs excepted.

REDFIELD, J.: The only question to be determined in this case is whether an action of *assumpsit* will lie upon the judgment of a court of record of one of the states in the American Union.

It is a long settled rule of the common law, that such action will lie upon a foreign judgment. This is almost the only rule, which can be considered as satisfactorily settled in the English courts, in regard to foreign judgments.

* * *

For although it appear by the record of the foreign court, that the court had jurisdiction both of the subject-matter in controversy, and of the person of the defendant, and that the proceedings were in all respects regular, yet all this may be contradicted by oral evidence, addressed to the jury, and the effect of the adjudication depend upon the opinion entertained by the jury, upon these points. So that the proper form of action is *assumpsit*, or debt on simple contract, where, under the plea of *non assumpsit*, or *nul debet*, any of these questions may be raised and submitted to the jury, under the charge of the court. * * *

And it is equally plain why *assumpsit*, or debt on simple contract, would not be appropriate to the case of a domestic judgment. In declaring upon a domestic judgment, we count upon the *evidence* and not upon the *contract*. The regular statement of the *debet* and *detinet* is indeed necessary, but is only an inference from the statement of the record, which precedes, and is not strictly traversable, under the general issue. That goes to the premises and not the inference, or conclusion. The same is true in declaring upon specialties, and in all cases where the *evidence* itself is made profert of, as in the case of letters testamentary, of specialties, and of records. In such cases the general issue denies the existence of the evidence, as *non est factum* and *nul tiel record*. And although, in the case of specialties, the fact is determined by the jury, yet in that case the issue is narrowed to the *single* fact of the *existence* of the *evidence*. So in the case of domestic judgments, the inquiry is not whether the court made such a judgment, and whether they had jurisdiction of the cause, and of the parties, and took regular proceedings, but whether there is such record, as that declared upon, and this question is determined by the court upon inspection of the record or the exemplification, and this exclusive of all other proof. But in the case of a foreign judgment, the declaration is upon the *contract*, and not upon the *record* or *evidence*. No profert of the record, in such case, need be made, and if made, will be treated as surplusage. *Walker v. Witter*, Doug. R. 1. I have gone thus minutely into the distinctions between foreign and domestic judgments in order to show the reason why *assumpsit* will lie in the case of the former, and not in that of the latter.

It only remains to determine to which of these classes the case now under consideration properly belongs. I apprehend there can be but one opinion upon this subject, if we regard the constitution and legislation of the United States, and especially the decisions of the United States supreme court in regard to the matter. The provision of the United States Constitution is (Art. IV, Sec. 1), "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." * * * These cases fully settled the doctrine that the judgment declared upon in this case is a record, consequently the declaration upon it must be upon the record, i. e. the evidence, and not, as in the case of a foreign judgment, upon the contract; that the declaration should be accompanied with a profert of the record, or an exemplification thereof, which will be verified only by inspection of the court, on the plea of *nul tiel record*. * * * We think *nul tiel record* is the only *general issue*, and that being the case, an action of *assumpsit* cannot be maintained upon such judgment.

Judgment affirmed.

(b) General Assumpsit.⁴⁷

X

SLADE'S CASE.

✓

Court of King's Bench. 1602.

4 Coke, 92b.

John Slade brought an action on the case in the King's Bench against Humphrey Morley (which plea began Hil. 38 Eliz. Rot. 305), and declared, that whereas the plaintiff, 10th of November, 36 Eliz., was possessed of a close of land in Haliburton, in the county of Devon, called Rack Park, containing by estimation eight acres for the term of divers

47. DECLARATIONS IN GENERAL ASSUMPSIT. *Indebitatus Assumpsit*. "For that whereas the said C D on the — day of —, in the year of our Lord —, at —, in the county of —, was indebted to the said A B in the sum of — l. of the lawful money of Great Britain, for divers goods, wares, and merchandise, by the said A B before that time sold and delivered to the said C D, and at his special instance and request, and being so indebted, he the said C D in consideration thereof, afterwards, to wit, on the day and year last aforesaid, in —, aforesaid, undertook and then and

years then and yet to come, and being so possessed, the plaintiff the said 10th day of November, the said close had sowed with wheat and rye, which wheat and rye, 8 Maii, 37 Eliz., were grown into blades, the defendant, in consideration that the plaintiff, at the special instance and request of the said Humphrey, had bargained and sold to him the said blades of wheat and rye growing upon the said close (the tithes due to the rector, etc., excepted) assumed and promised the plaintiff to pay him 16*l.* at the Feast of St. John the Baptist then to come: and for the nonpayment thereof at the said Feast of St. John Baptist, the plaintiff brought the said action: the defendant pleaded *non assumpsit modo et forma*; and on the trial of this issue the jurors gave a special verdict, *sc.* that the defendant bought of the plaintiff the wheat and rye in blades growing upon the

there faithfully promised the said A B to pay him the said last-mentioned sum of money, when he the said C D should be thereunto afterwards requested.

"Nevertheless the said C D, not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said A B, in this behalf, hath not as yet paid the said sum of money, or any part thereof, to the said A B, although often requested so to do. But the said C D to pay him the same hath hitherto wholly neglected and refused, and still doth neglect and refuse. To the damage of the said A B of — *l.* and therefore he brings his suit, etc." 2 Chitty on Pleadings, pp. 5, 16, 44.

If the action be brought for work and labor, use and occupation, money lent, money paid, money had and received, etc., the same form is used, substituting such allegation for the one used above. But in the count for money had and received no request need be alleged.

Quantum valebant. "For that whereas the said C D on the — day of —, in the year of our Lord —, at —, in the county of —, in consideration that the said A B, at the special instance and request of the said C D, had before that time sold and delivered divers goods, wares and merchandise, to the said C D, he the said C D undertook and then and there faithfully promised to said A B to pay him so much money as the last-mentioned goods, wares and merchandise, at the time of the said sale and delivery thereof, were reasonably worth, when he the said C D should be thereunto afterwards requested. And the said A B avers that the last-mentioned goods, wares and merchandise, at the time of the said sale and delivery thereof were reasonably worth the sum of — *l.* of lawful money of Great Britain, to wit, at, etc. aforesaid, whereof the said C D afterwards. to wit, on, etc. aforesaid, there had notice.

"Nevertheless the said C D, not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said A B, in this behalf, hath not as yet paid the said sum of money, or any part thereof, to the said A B, although often requested so to do. But the said C D to pay him the same hath hitherto wholly neglected and refused, and still doth neglect and refuse. To the damage of the said A B of — *l.* and therefore he brings his suit, etc." 2 Chitty on Pleading, pp. 6, 16, 44.

Quantum meruit. Same as *quantum valebant*, except that it is for work and labor, and allege a promise to "A B to pay him so much money as he therefor reasonably deserved to have of the said C D." 2 Chitty on Pleading, 6.

said close as is aforesaid, *prout* in the said declaration is alleged, and further found, that between the plaintiff and the defendant there was no other promise or assumption but only the said bargain; and against the maintenance of this action divers objections were made by John Dodderidge of counsel with the defendant. 1. That the plaintiff upon this bargain might have ordinary remedy by action of debt, which is an action formed in the register, and therefore he should not have an action on the case, which is an extraordinary action, and not limited within any certain form in the register. * * * And as to these objections, the Courts of King's Bench and Common Pleas were divided; for the Justices of the King's Bench held, that the action (notwithstanding such objections) was maintainable, and the Court of Common Pleas held the contrary. And for the honour of the law, and for the quiet of the subject in the appeasing of such diversity of opinions (*quia nil in lege intolerabilius est eandem rem diverso jure ceneri*) the case was openly argued before all the Justices of England, and Barons of the Exchequer, *sc.* Sir John POPHAM, Knt. C. J. of England, Sir Edm. ANDERSON, Knt. C. J. of the Common Pleas, Sir W. PERIAM, Chief Baron of the Exchequer, CLARK, GAWDY, WALMESLEY, FENNER, KINGSMILL, SAVIL, WARBURTON, and YELVERTON, in the Exchequer Chamber, by the Queen's Attorney-General for the plaintiff, and by John Dodderidge for the defendant, and at another time the case was argued at Serjeant's Inn, before all the said justices and Barons, by the Attorney-General for the plaintiff, and by Francis Bacon for the defendant, and after many conferences between the justices and Barons, it was resolved, that the action was maintainable, and that the plaintiff should have judgment. And in this case these points were resolved: 1. That although an action of debt lies upon the contract, yet the bargainor may have an action on the case, or an action of debt at his election and that for three reasons or causes. * * * 3. It was resolved, that every contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay, or deliver it, and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, in that case both parties may have

an action of debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt, and therewith agrees the judgment in *Reed and Norwood's case*, Pl. Com. 128. 4. It was resolved, that the plaintiff in this action on the case on *assumpsit* should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that a recovery or bar in this action should be a good bar in an action of debt brought upon the same contract; so *vice versa*, a recovery or bar in an action of debt, is a good bar in an action on the case on *assumpsit*. *Vide* 12 E. 4. 13 a. 2 R. 3. 14. (32) 33 H. 8. Action sur le Case. Br. 105. * * * 48

48. "In the early actions upon a promise to pay a debt it was necessary to show that the promise was made after the debt was created. ['For if he promises at the time of the contract, then debt lies on this [promise] and not *assumpsit*; but if he promises after the contract then action lies on the *assumpsit*.']—Dalison, 84, pl. 35, 14, Eliz.] * * * In *Slade's Case* the question was raised whether the action of *assumpsit* could be maintained upon a simple debt without proof of a subsequent express promise. The argument in *Norwood v. Read* had contained the suggestion that 'every contract executory is an *assumpsit* in itself.' This view was now accepted, and, after full argument before all the judges of England and barons of the Exchequer, it was held in the King's Bench that *assumpsit* will lie upon any simple debt without proof of a promise. This holding proceeds on the idea that the creation of a simple debt can be viewed in a double aspect, viz., (1) as originating a contractual duty on which debt will lie, and (2) as importing a promise on which *assumpsit* can be maintained.

"It will be noted that prior to this decision the express promise to pay a debt, made after the creation of the debt, was considered as being supported by the consideration of the legal duty to pay the precedent debt. The necessity for appealing to this exceptional sort of consideration arose from the fact that when a man promises to pay an existing debt he incurs no present detriment, and hence consideration in the ordinary sense is absent. *Slade's Case* abrogated the need for relying upon the consideration of legal duty, for the promise which was now implied is raised by implication of law at the very moment the debt is created. Hence such implied promise is supported by the consideration (*quid pro quo*) which originates in debt. Accordingly this exceptional type of consideration, of which only a momentary glimpse has been caught, disappeared almost entirely from view. Prior to *Slade's Case* an implied consideration was used to support an actual promise; now the law raised an implied promise upon a real consideration.

"*Slade's Case* marks an important epoch in the history of English contract law but no event in legal history is more likely to be misinterpreted. * * * It is therefore of the utmost importance that the real significance of the decision should not escape us. To this end we must here lay the proper emphasis upon the distinction between the conception of contractual obligation which underlies the common-law debt and that conception of contractual obligation which is found in the assumptual promise.

"An idea, we take it, almost universally prevails to the effect that our law of contract is underlaid by some single conception. * * *

"Our law of contract is unshakably planted upon two conceptions instead of one. The idea of contractual duty imposed by law, which was the first conception of contract revealed in the common law, eternally abides. It has not been supplanted; it has only been in a measure obscured by the modern conception of the obligation of a promise.

"It is true that the action of debt was swallowed up in the action of *assumpsit*, and Slade's Case marks the point at which this event occurred. But — and here is the whole import of that decision — the point involved was one of remedy purely. It was necessary that simple contract law should be entirely freed from the meshes of the action of debt. The only way to accomplish this was for the courts to hold that upon the creation of a simple debt the law raises an implied promise such as will support *assumpsit*. The step was taken. The result was that the action of debt as a remedy upon simple contracts practically disappeared, its place being taken by *indebitatus assumpsit*. But though the action disappeared, the conception of liability which underlies the debt did not. The supersession of the action of debt resulted of necessity in an occultation of the conception of liability which underlies the debt, but did not destroy that conception.

"Still, from Slade's Case until this good day there has been more or less confusion in the minds of legal thinkers between the conceptions of contractual duty imposed by law and the conception of the obligation of a promise. The older notion has been almost entirely overlooked. Men have talked about the implied promise, which is nominally the foundation of the action of *indebitatus assumpsit*, until they have actually come to think that the same conception is here presented to view as in the ordinary engagement by actual promise. But the distinction is fundamental and must be preserved. As we shall hereafter perceive, the sole clue to a proper understanding of the quasi-contracts is found in the ancient and indestructible conception of contractual duty imposed by law. A thing constantly to be borne in mind by the student of modern contract law is that in dealing with the mysterious implied promise, he is really in contact with the simple debt in disguise. The implied promise is purely a remedial fiction."

2 Street on Foundations of Legal Liability, 62-66.

HERSEY v. NORTHERN ASSURANCE COMPANY.

Supreme Court of Vermont. 1903.

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75 Vermont, 441.

STAFFORD, J.: The plaintiff is seeking to recover upon a fire insurance policy; and the case stands upon a demurrer to each of the six counts of his declaration. The first and second are intended as general counts in *assumpsit*; neither is claimed to be good as a special count. We think it clear that at common law neither would be good as a general count, because it discloses an express promise as the indispensable basis of recovery. The allegations of fact, aside from the promise, are not such that the law raises therefrom an implied promise. Although the existence of an express promise in a special contract does not prevent a recovery upon a promise implied by law, when the contract has been fully performed on the part of the plaintiff, and nothing remains to be done on the part of the defendant except to pay money, it is always necessary that what has been done on the part of the plaintiff should

be sufficient of itself to raise an implied promise. In the present case the facts aside from the promise, viz., the plaintiff's ownership of the property, its destruction by fire without his fault—even the payment of premiums—do not raise an implied promise by the defendant to pay—it is only the fact that it promised, upon certain conditions, to pay, that makes it liable. Consequently, at common law, the promise, the conditions, and the fulfillment of the conditions, must be set forth—in other words the count must be special. See the notes to *Cutter v. Powell*, 2 Smith's Lead. Cas. 8, and the admirable account of the action of *assumpsit* in Perry's Common-Law Pleading, 82-89.⁴⁹

* * * * *

49. But an action in general *assumpsit* will lie to recover back premiums paid under a policy of insurance when by reason of fraud, want or failure of consideration, wrongful repudiation of the contract by the insurer, or other cause, the law raises an implied contract to repay. See 2 Cooley: Briefs on the Law of Insurance, 1037—1062. The same doctrine applies to contracts generally.

MOSES v. MACFERLAN. ✓

Court of King's Bench. 1760.

2 Burrow, 1005.

LORD MANSFIELD delivered the resolution of the Court in this case; which stood for their opinion, “whether the plaintiff could recover against the defendant, in the present form of action (an action upon the case for money had and received to the plaintiff's use); or whether he should be obliged to bring a special action upon the contract and agreement between them.”

It was an action upon the case, brought in this Court by the now plaintiff, Moses, against the now defendant Macferlan (heretofore plaintiff in the Court of Conscience, against the same Moses now plaintiff here), for money had and received to the use of Moses the now plaintiff in this Court.

The case, as it came out upon evidence and without dispute, at Nisi Prius before Lord MANSFIELD at Guildhall, was as follows:

It was clearly proved, that the now plaintiff, Moses, had indorsed to the now defendant Macferlan, four several promissory notes, made to Moses himself by one Chapman Jacob for 30s. each, for value received, bearing date 7th November, 1758; and that this was done, in order to enable the now defendant Macferlan to recover the money in his own name, against Chapman Jacob. But previous to the now plaintiff's indorsing these notes, Macferlan assured him "that such his indorsement should be of no prejudice to him;" and there was an agreement signed by Macferlan, whereby he (amongst other things) expressly agreed "that Moses should not be liable to the payment of the money or any part of it; and that he should not be prejudiced, or be put to any costs, or any way suffer, by reason of such his indorsement." Notwithstanding which express condition and agreement, and contrary thereto, the present defendant Macferlan summoned the present plaintiff Moses into the Court of Conscience (23 Geo. 2, c. 33), upon each of these four notes, as the indorser thereof respectively, by four separate summonses. Whereupon Moses (by one Smith who attended the Court of Conscience at their second Court, as solicitor for him and on his behalf), tendered the said indemnity to the Court of Conscience, upon the first of said four causes; and offered to give evidence of it, and of the said agreement, by way of defense for Moses in that Court. But the Court of Conscience rejected this defense, and refused to receive any evidence in proof of this agreement of indemnity, thinking that they had no power to judge it; and gave judgment against Moses, upon the mere foot of his indorsement (which he himself did not at all dispute), without hearing his witnesses about the agreement "that he should not be liable;" for the commissioners held this agreement to be no sufficient bar to the suit in their Court; and consequently decree for the plaintiff in that Court, upon the undisputed indorsement made by Moses. This decree was actually pronounced, in only one of the four causes there depending; but Moses's agent (finding the opinion of the commissioners to be as above-mentioned), paid the money into that Court, upon all the four notes; and it was taken out of Court by the now Defendant Macferlan (the then plaintiff, in that Court), by order of the commissioners.

All this matter appearing upon evidence before Lord MANSFIELD at Nisi Prius at Guildhall, there was no doubt but that, upon the merits, the plaintiff was entitled to the money; and accordingly, a verdict was there found for Moses, the plaintiff in this Court for 6*l.* (the whole sum paid into the Court of Conscience); but subject to the opinion of the Court, upon this question, "whether the money could be recovered in the present form of action, or whether it must be recovered by an action brought upon the special agreement only."

* * * * *

LORD MANSFIELD now delivered their unanimous opinion, in favour of the present action.

There was no doubt at the trial, but that upon the merits the plaintiff was entitled to the money; and the jury accordingly found a verdict for the 6*l.* subject to the opinion of the court upon this question, "whether the money might be recovered by this form of action," or "must be by an action upon the special agreement only."

Many other objections, besides that which arose at the trial, have since been made to the propriety of this action in the present case.

The first objection is, "that an action of debt would not lie here; and no *assumpsit* will lie, where an action of debt may not be brought." some sayings at Nisi Prius, reported by note takers who did not understand the force of what was said, are quoted in support of that proposition. But there is no foundation for it.

It is much more plausible to say, "that where debt lies, an action upon the case ought not to be brought." And that was the point relied upon in *Slade's Case*; but the rule then settled and followed ever since is, "that an action of *assumpsit* will lie in many cases where debt lies, and in many where it does not lie."

A main inducement, originally, for encouraging actions of *assumpsit* was, "to take away the wager of law;" and that might give rise to loose expressions, as if the action was confined to cases only where that reason held.

Second objection.—"That no *assumpsit* lies, except upon an express or implied contract; but here it is impossible to presume any contract to refund money, which the defendant recovered by an adverse suit."

Answer. If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of plaintiff's case, as it were upon a contract ("*quasi ex contractu*," as the Roman law expresses it).

This species of *assumpsit* ("for money had and received to the plaintiff's use"), lies in numberless instances, for money the defendant has received from a third person; which he claims title to, in opposition to the plaintiff's right; and which he had, by law, authority to receive from such third person.

Third objection.—Where money has been recovered by the judgment of a Court having competent jurisdiction, the matter can never be brought over again by a new action.

Answer. It is most clear, "that the merits of a judgment can never be overhauled by an original suit, either at law or in equity." Till the judgment is set aside, or reversed, it is conclusive, as to the subject-matter of it, to all intents and purposes.

But the ground of this action is consistent with the judgment of the Court of Conscience: it admits the commissioners did right. They decreed upon the indorsement of the notes by the plaintiff; which indorsement is not now disputed. The ground upon which this action proceeds, was no defence against that sentence.

It is enough for us, that the commissioners adjudged "they had no cognizance of such collateral matter." We can not correct an error in their proceedings; and ought to suppose what is done by a final jurisdiction, to be right. But we think, "the commissioners did right, in refusing to go into such collateral matter." Otherwise, by way of defence against a promissory note for 30s. they might go into agreements and transactions of a great value; and if they decreed payment of the note, their judgment might indirectly conclude the balance of a large account.

The ground of this action is not "that the judgment was wrong;" but, "that (for a reason which the now plaintiff could not avail himself of against that judgment), the defendant ought not in justice to keep the money." And at Guildhall, I declared very particularly, "that the merits of a question, determined by the commissioners, where they had jurisdiction, never could be brought over again, in any shape whatsoever."

Money may be recovered by a right and legal judgment; and yet the iniquity of keeping that money may be manifest, upon grounds which could not be used by way of defence against the judgment.

Suppose an indorsee of a promissory note, having received payment from drawer (or maker) of it, sues and recovers the same money from the indorser who knew nothing of such payment.

Suppose a man recovers upon a policy for a ship presumed to be lost, which afterwards comes home; or upon the life of a man presumed to be dead, who afterwards appears; or upon a representation of a risque deemed to be fair, which comes out afterwards to be grossly fraudulent.

But there is no occasion to go further: for the admission "that unquestionably, an action might be brought upon the agreement," is a decisive answer to any objection from the judgment. For it is the same thing, as to the force and validity of the judgment, and it is just equally affected by the action, whether the plaintiff brings it upon the equity of his case arising out of the agreement, that the defendant may refund the money he received; or upon the agreement itself, that besides refunding the money, he may pay the costs and expenses the plaintiff was put to.

This brings the whole to the question saved at *Nisi Prius*, "viz., whether the plaintiff may elect to sue by this form of action, for the money only; or must be turned round, to bring an action upon the agreement."

One great benefit, which arises to suitors from the nature of this action, is, that the plaintiff need not state the special circumstances from which he concludes "that, *ex aequo et bono*, the money received by the defendant, ought to be deemed as belonging to him:" he may declare generally, "that the money was received to his use:" and make out his case, at the trial.

This is equally beneficial to the defendant. It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that, may go into every equitable defence, upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing which shews that the plaintiff *ex aequo et bono*, is not entitled to the whole of his demand, or to any part of it.

If the plaintiff elects to proceed in this favorable way, it is a bar to his bringing another action upon the agreement; though he might recover more upon the agreement, than he can by this form of action. Therefore, if the question was open to be argued upon principles at large, there seems to be no reason or utility in confining the plaintiff to an action upon the special agreement only.

* * * * *

This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex aequo et bono*, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play; because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

In one word, the gist of this kind of action, is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Therefore we are all of us of opinion that the plaintiff might elect to wave any demand upon the foot of the indemnity, for the costs he had been put to; and bring this action, to recover the *6l.* which the defendant got and kept from him iniquitously.

Rule: That the *postea* be delivered to the plaintiff.

JONES v. HOAR. ✓

*Supreme Judicial Court of Massachusetts. 1827.**5 Pickering, 285.*

Assumpsit upon a promissory note, for goods sold and delivered, and for money had and received. The case came before the Court upon an agreed statement of facts.

* * * * *

The cause of action upon which the count for goods sold was founded, was, that the defendant had entered upon the plaintiff's land and cut and carried away a quantity of white oak timber. And the question was argued (in writing) whether the plaintiff could waive the tort and sue in *assumpsit*, it not appearing that the timber had been sold by the defendant.

* * * * *

PARKER, C. J.: The plaintiff declares in *assumpsit*, and one count is for goods sold and delivered. By the agreement it appears, that the only ground for supporting this count is, that the defendant cut and took away certain trees from land claimed by the plaintiff, and for the purpose of the argument, actually owned by him. The proper action would undoubtedly be trespass for the injury to the land, or trover for the trees. But the plaintiff contends that he has a right to waive the tort, and charge the defendant with the trees as sold to him. Upon examination of the authorities cited, which are well summed up and commented upon by STRONG, J., in the opinion of the Court of Common Pleas, we are satisfied that the plaintiff cannot maintain this position. There is no contract express or implied between the parties, and therefore an action *ex contractu* will not lie. The whole extent of the doctrine, as gathered from the books, seems to be, that one whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrong-doer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds. No case can be shown where *assumpsit* as for goods sold lay in such case, except it be against the executor of the wrong-doer, the tort being

extinguished by the death, and no other remedy but *assumpsit* against the executor remaining. Such was the case of *Hambly v. Trott*, Cowp. 371, referred to in Judge STRONG's opinion.⁵⁰

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50. *Accord*: Miller v. King (1880) 67 Ala. 575; Cragg v. Arendale (1901) 113 Ga. 181; Johnston v. Salisbury (1871) 61 Ill. 316; Quimby v. Lowell (1897) 89 Me. 547; Lyon v. Clark (1902) 129 Mich. 381; Knapp v. Hobbs (1871) 50 N. H. 476; Whipple v. Stephens (1904) 25 R. I. 563; Winchell v. Noyes (1851) 23 Vt. 303; Bowman v. Browning (1856) 17 Ark. 599. In a note to Jones v. Hoar (text, *supra*) the opinion of STRONG, J., rendered below in the Common Pleas, is set out, analysing the English cases and showing that this was probably the English rule.

On the contrary. A number of courts take the view that even though there has been no sale of the goods tortiously taken, an implied *assumpsit* may nevertheless arise, but it is an *assumpsit* for goods sold, not for money had and received. Thus, in Terry v. Munger (1890) 121 N. Y. 161, the court said:

"If the wrong-doer has not sold the property, but still retains it, the plaintiff has the right to waive the tort and proceed upon an implied contract of sale to the wrong-doer himself, and, in such event, he is not charged as for money had and received by him to the use of the plaintiff. The contract implied is one to pay the value of the property, as if it had been sold to the wrong-doer by the owner."

In *accord* with this latter view are Isaacs v. Hermann (1873) 49 Miss. 449; Moore v. Richardson (1902) 68 N. J. L. 305; Kirkman v. Philip's Heirs (1872) 7 Heisk. (Tenn.) 222; Gordon v. Bruner (1872) 49 Mo. 570; Galvin v. MacMin. & Mill Co. (1894) 14 Mont. 508; Chittenden v. Pratt (1891) 89 Cal. 178; Braithwaite v. Akin (1893) 3 N. D. 365; Norden v. Jones (1873) 33 Wis. 600; Deysher v. Triebel (1870) 64 Pa. St. 383; Rees & Sons Co. v. Western Exposition Society (1910) 44 Pa. Super. Ct. 381.

 PARKER & SON v. CLEMONS. 

Supreme Court of Vermont. 1908.

80 Vermont, 521.

TYLER, J.: *Assumpsit* with common counts. Plea, general issue. It appeared by an agreed statement of facts that the defendant was manager of a telephone company, and was engaged, with an assistant, in wiring a business block in Fair Haven; that while so engaged the assistant, in the defendant's absence from the room, accidentally over-turned a jar of chemical fluid; that the fluid ran out, leaked through the floor into the plaintiff's jewelry store, and injured various articles therein. The defendant was not employed by the telephone company, but was in charge of the

work at the request of the son of the owner of the block, and the assistant was also employed by him. When the plaintiff discovered the injury to his goods he sent for the defendant, showed them to him, and informed him that part of them would have to be sent away to be repaired. The defendant then promised the plaintiff that he would pay him the amount of the damage when he ascertained what it was. The plaintiff had the goods repaired, showed the bill therefor to the defendant, who at first agreed to pay it, but afterwards refused to pay it unless the owner of the block would pay one-half, which the latter would not do.

* * * The plaintiff contends that the count for an account stated will lie; but we think that his demand does not fall within the definition of an account. It was said by Chief Justice SHAW in *Whitwell v. Willard*, 1 Mete. (Mass.) 216, that the primary idea of account, *computatio*, is some matter of debt and credit, or demands in the nature of debt and credit between parties; that it implies that one is responsible to another for money or other things, either on the score of contract, or of some fiduciary relation. It is doubtless true, however, that it would be sufficient to come within the definition if the accounts were all on one side, provided the amount were agreed to by the parties. *Langdon v. Roane's Adm'r*, 6 Ala. 518, 41 Am. Dec. 60, and note. The form adopted by Chitty, and ever since followed, is that "the defendant accounted with the plaintiff of and concerning divers sums of money before then due from the defendant to the plaintiff, and then in arrear and unpaid, and that upon such accounting the defendant was found to be in arrear to the plaintiff in a named sum, and that, being so found in arrear and indebted, the defendant in consideration thereof undertook and faithfully promised," etc., and the allegation of the breach in this, as in the other common counts, is: "Yet the defendant, not regarding his said promises, * * * hath not, although often requested, as yet paid said sum of money," etc. Bouvier defines "account stated" as an agreed balance of account. * * *

We also refer to some of the earlier authorities. It is said in 1 Saund. Pl. & Ev. (5th Ed.), page 47, in respect to a recovery upon this count, that it must be proved that the account was "of money or a debt." It is also there said that an account stated does not alter the nature of the origi-

nal debt. It was held in *Knowles v. Mitchell*, 13 East, 249, that an admission by the defendant that a certain sum was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, would support a count upon an account stated. It was decided in *Whitehead v. Howard*, 5 Moore, 105, cited in Saunders, that a recovery could not be had upon this count because there was no existing antecedent debt due from the defendant to the plaintiff. *Wilks v. Jernegan*, 2 Atk. 251; *Peacock v. Harris*, 10 East, 106. If the defendant in the present case was primarily liable to the plaintiff, it was in an action of trespass on the case for a tort. The damages consequent upon the wrongful act were not a proper subject of book account, and were not treated as such by the plaintiff. He paid for the repairs, and took receipted bills for such payments.

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Bradley v. Phillips' 52 Vt. 517, is distinguishable from the present case. There the parties, being owners of adjoining lands, each had cut logs over the line on the other's land. They settled by an agreement that each should pay the other at specified rates for the logs taken, and the plaintiff had paid the defendant. But the latter, though having taken the property and having promised to pay for it, and having induced the plaintiff to pay for what he had taken, refused to pay the plaintiff. The court held that the question was one purely of contract, that the defendant's agreement was to pay the plaintiff for what logs he had taken, that nothing remained for him to do but pay over the money, and that the plaintiff could recover upon the common counts. The defendant's liability was the same as if he had bought the logs and promised to pay the plaintiff for them. The parties, in legal effect, waived their respective claims for torts, settled their claims, and promised to pay each other the sums agreed upon for the logs each had taken, whereupon each became the other's debtor.

In the case before us the defendant did not become the plaintiff's debtor, and, upon the authorities, he cannot recover upon the count for an account stated.

Judgment reversed, and cause remanded.

WALKER v. BROWN.

*Supreme Court of Illinois. 1862.**28 Illinois, 378.*

Brown and Hollingsworth sued Walker in *assumpsit*. The declaration contained the common counts only. * * *

BREESE, J.: The record shows, that the contract under which this work was done was a sealed contract. The parties agree that the work was commenced and prosecuted under this contract, and the price fixed by it was fourteen hundred dollars.

The defendants, after performing the work under this agreement, now abandon it, and bring this suit upon an implied promise in law, to recover the value of the services rendered, and the jury, under the instruction of the court, have assessed their damages to eighteen hundred and forty dollars, being four hundred and forty dollars more than the ratable price as expressed in the contract, and under and for which it was performed.

The question for our consideration comes upon the refusal of the court to give the following instruction asked for by the plaintiff in error: "If the jury believe, from the evidence, that the plaintiffs entered into a contract in writing, and under seal, with Thomas Shergold and others—the contract read in evidence—and performed the work sued for under said contract, then the jury will find for the defendant."

This refusal is the error now insisted upon. This instruction, like the second and fourth, which the court modified, presents, substantially, the question, whether the contract under which the work was performed is to govern the remedy and right of recovery. We have no doubt, in reason and on authority, the contract must govern; and so believing, the modifications of the second and fourth instructions, and the refusal to give the one here copied, were erroneous.

As in physics, two solid bodies cannot occupy the same space at the same time, so in law and common sense, there cannot be an express and an implied contract for the same thing, existing at the same time. This is an axiomatic truth.

It is only when parties do not expressly agree, that the law interposes and raises a promise.

The error in this whole proceeding arises upon the assumption, that the plaintiff in error might become liable, under the implication of law, that he should pay the reasonable worth of services, beneficial to him, bestowed upon his property, with his knowledge and acquiescence, notwithstanding such services were rendered under an express agreement with another person.

An express contract, executory in its provisions, must totally exclude any such implication. One party agreed, in consideration of the other to pay, to render the service; the other, in consideration of the promise to render the service, agrees to pay. One is the consideration and motive for the other, and each equally excludes any other consideration, motive, or promise.

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In the case of *Cutler, Adm'x, v. Powell*, 6 T. R. 324, Lord KENYON, C. J., said, "That where parties have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom in the law. Here the defendant expressly promised to pay the intestate thirty guineas, provided he proceeded, continued and did his duty as second mate in the ship from Jamaica to Liverpool;" and ASHURST, J., said, "It has been argued, however, that the plaintiff may now recover on a *quantum meruit*, but she had no right to desert the agreement; for, wherever there is an express contract, the parties must be guided by it; and one party cannot relinquish or abide by it, as it may suit his advantage."

The whole current of authorities seems to bear in this direction. We have examined some of them. *Young v. Paxton*, 4 Cranch, 229; *Raymond et al. v. Barnard*, 12 Johns. 374, and cases there cited; *Whitney v. Sullivan*, 7 Mass. 109; *Robertson v. Lynch*, 18 Johns. 456.

This case shows, if work is in fact done under a special contract, the plaintiff cannot recover under a *quantum meruit*. In this case, the work was done under a special contract made with a party assuming to act for the plaintiff in error, and the recovery must be had on that contract.

* * * * *

When the contract has been performed, the plaintiff may recover on simple contract the price of the service, under

an *indebitatus assumpsit*, but the contract must regulate the amount of the recovery. *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 299; *Holmes v. Stummel*, 24 Ill. 370.

This distinction, as to the form of the remedy upon executed or executory contracts, is fully laid down and recognized, and is perfectly consistent with the principle excluding implication when express contracts exist. *James et al. v. Cotton*, 20 Eng. C. L. Rep. 129; *Kimball v. Tucker et al.*, 10 Mass. 195; *Londregon v. Crowley*, 12 Conn. 561; *Charles v. Dana*, 14 Maine, 383; *Mead v. Degolger*, 16 Wend. 637; and numerous other authorities might be cited to the same effect. It follows then, that suit must be brought against the parties to this contract. They have made it in the form that suited them best, and that must be the ground of action, and measure of relief. *Parker v. Emery*, 28 Maine, 494.

The reason of the rule is plain. Parties are bound by their agreement, and therefore there is no ground for implying a promise when there is an express contract. The contract must be sued on. The defendants seem to have misconceived the doctrine.

Although the contract may be a subsisting unexecuted contract, and on that account requires a suit on the instrument itself, yet the right to bring *indebitatus assumpsit*, for money due on an executed contract, does not entitle the party to set aside the contract, and sue on a *quantum meruit*. It is a question as to the form of the action. But whether it be a general count on an *indebitatus assumpsit*, or a special count on the contract itself, the parties to the contract must be the parties to the suit, and be controlled by its provisions.

For the reasons given, the judgment of the court below is reversed.

Judgment reversed.

LONDREGON v. CROWLEY.

*Supreme Court of Errors of Connecticut. 1838.**12 Connecticut, 558.*

This was an action of *assumpsit*. The declaration contained three counts. The first was special, alleging, that on the 24th of *February*, 1837, by a certain agreement made by and between the plaintiff and defendant, it was agreed, that the plaintiff should build a certain addition to the dwelling house of the defendant, in the city of New Haven, according to the particulars and in the manner following, viz., * * * that the defendant then and there agreed with the plaintiff, to pay him therefor, the sum of fifty-five dollars. This count then proceeded to allege the performance on the plaintiff's part, and a breach on the part of the defendant.

The second count was *indebitatus assumpsit* for work and labour; and the third, a *quantum meruit*.

WAITE, J.: The defendant in this case claims, that if the work was performed under a special contract, variant from that stated in the first count in the declaration, the plaintiff cannot recover, either upon the first count, by reason of the variance, or upon the others, because they are general. The rule upon this subject is very correctly stated by Mr. Chitty, one of the most accurate of the elementary writers upon law. "With respect to debts for work and labour or other personal services, it is a rule that however special the agreement, if it was not under seal, and the terms of it have been performed on the plaintiff's part, and the remuneration was to be in money, it is not necessary to declare specially, and the common *indebitatus* count is sufficient." 1 Chitt. Plead. 332. And it is also settled, that the plaintiff is entitled to recover on the general count, where the work has been performed, although he had declared on a special agreement, and failed in the proof. 3 Stark. Evid., 1762. 1 Selw. N. P. 82. In the case of *Alcorn v. Westbrook*, 1 Wils. 117, DENNISON, J., says, if a man agrees to build for another a house, and afterwards builds it, in this case he has two ways of declaring, either upon the original *executory* agreement, as to be performed *in future*, or upon

the *indebitatus assumpsit* or *quantum meruit*, where the house is actually built and the agreement executed. 1 Selw. N. P. 83.

GIBBS, C. J., in the case of *Robson v. Godfrey et al.*, said: "I have always understood the rule to be, that unless there be something in the terms of the special agreement, which either by express stipulation or necessary intendment, precludes the plaintiff from recovering for work and labour generally, he is entitled after the contract has been executed, to maintain an action for work and labour done generally. It is every day's experience that a party may recover on the general counts for work and labour done under a special contract." 1 Holt's N. P. Ca. 236. S. C. 1 Stark. Rep. 275, 277.

The Supreme Court of the United States, in the case of *The Bank of Columbia v. Paterson*, say: "We take it to be incontrovertibly settled, that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed; and that it is not in such case necessary to declare upon the special contract." 7 Cranch, 299. And again, in the case of *The Chesapeake & Ohio Canal Company v. Knapp et al.*, after repeating the rule as laid down in the preceding case, they add: "Whether this doctrine be considered as established, by the adjudications of this court, or the sanction of other courts, it is equally clear, that no principle involved in the action of *assumpsit*, can be maintained, by a greater force of authority." 9 Peters, 566.

These authorities shew, most conclusively, that, upon well established principles of the common law, if the plaintiff has performed the work, according to the terms of the contract, he may recover upon the general counts for work and labour done; and that the addition of a special count setting forth a contract different in terms from the one proved, will not affect his right to recover upon the general counts.

It has, however, been supposed, that the decision in the case of *Russell v. South Briain Society*, 9 Conn. Rep. 508, conflicts with the law of this case. But upon an examination of the two cases, it will be found, that they are materially different, and are decided upon different principles. There the plaintiff had subscribed to a fund for the

support of the gospel ministry, which was to be managed by the society, in a certain specific manner. The plaintiff paid the amount of his subscription; and the fund was received by the society, and managed by them, for a number of years, until the principal part was lost, by the failure of a bank. The plaintiff then brought his action against the society, and having failed to prove those counts in his declaration which set forth the contract made by the society, claimed to recover back the money paid, under the general count for money had and received. The court decided, that the plaintiff could not recover, upon the ground that the contract had not been rescinded by the defendant, but remained an open subsisting contract. The court did not intend to establish any new principle, but expressly referred to a *rule well settled*, and to a decision of Lord MANSFIELD, and to a subsequent decision of the court of King's Bench in support of it. The rule that governed in that case, is thus stated by Mr. Chitty: "Where a payment has been made on a contract, which has been put an end to; as where, either by the terms of the contract it was left in the plaintiff's power to rescind it, and he does so, or where the defendant afterwards assents to its being rescinded, the general count may be supported; but if the contract continue open, as it is technically termed, he can only recover damages, and must declare specially." 1 Chitt. Plead. 342.

The same rule was explicitly recognized, by the supreme court of the United States, in the case cited from Peters' reports. They there say, that there can be no doubt that where the special contract remains open, the plaintiff's remedy is on the contract, and he must declare specially. They afterwards add: "And it is a well settled principle, that when a contract has been performed, a plaintiff may recover on the general counts."

They thus recognize both rules as well settled and undoubted, and not at all inconsistent with each other.

The court, in the case cited from Connecticut reports, were of opinion that, as the money was paid upon a contract that remained open and unrescinded, the plaintiff was entitled only to damages for the nonfulfilment of that contract; and must, therefore, declare specially. In the case under consideration, the plaintiff having performed his contract, seeks to recover a compensation for his services—a

debt due from the defendant for the labour performed. And if he actually performed the labour according to the contract, there is nothing to prevent his recovering upon the general counts.

It is also claimed by the defendant, that the plaintiff could only recover upon the *quantum meruit* count, if the work was done under a contract different from that stated in the special count. If this were so, it is difficult to see how that would furnish any ground for a new trial, as the jury have found a verdict upon that count in favour of the plaintiff; and it does not appear from the motion, that damages have been assessed differently from what they would have been, had the verdict upon both the other counts been in favour of the defendant. But the rule upon this subject is, that under an *indebitatus* count the plaintiff may recover what may be due him, although no specific price was agreed upon. And where that count is inserted, the *quantum meruit* count is generally unnecessary. 1 Chitt. Plead., 337.

It has been further said, that the court should have charged the jury, that if the work was left unfinished, the plaintiff could not recover upon either count. This, we think, sufficiently appears from the charge stated in the motion. The instruction is, that if the work had been done under a special contract, and had not been completed according to the contract, or the contract had not been fulfilled on the part of the plaintiff, he could not recover upon either count. Clearly nothing more could be necessary.

For these reasons, we think there ought to be no new trial; and so we advise the superior court.

In this opinion the other Judges concurred.

*New trial not to be granted.*⁵¹

51. General *assumpsit* will not lie in such cases where the express contract is void by statute: *Cashin v. Pliter* (1912) 163 Mich. 386.

DAVIS v. SMITH. ✓

*Supreme Judicial Court of Maine. 1887.**79 Maine, 351.*

FOSTER, J.: * * * It appears that the plaintiff, on January 24, 1871, gave his negotiable promissory note for \$209 to Harrison Dorr, guardian of Rosetta Dorr, niece of the defendant, payable on the first day of January, 1874. The defendant had obtained letters of guardianship in an adjoining county in which she resided, and with whom Rosetta was at that time living; and, soon after the note became due, represented to the plaintiff that she was the lawful guardian of Rosetta Dorr, and as such was legally authorized to collect said note, whereupon the plaintiff paid the defendant the sum of \$231.21, the amount then estimated to be due upon the note. At the same time, and in consideration thereof, the defendant agreed in writing to fully indemnify and save the plaintiff harmless in consequence of his paying the note to her. Suit was afterwards commenced by the indorsee of the note. The case was tried and carried to the full court. Finally, judgment was rendered against this plaintiff for the amount of the note, and interest thereon from that date. *Dorr v. Davis*, 76 Me. 301. After judgment was rendered against him this plaintiff paid the amount of it, together with costs of suit, to the plaintiff in that action, and now seeks to recover the sum thus paid, amounting to \$479, from the defendant in this suit. * * *

Nor do we think that the objection of the defendant is tenable, that, there being a written contract of indemnity, the plaintiff must declare specially upon such contract, and will not be allowed to introduce proof in support of his claim under the general count for money paid. The objection is one of form, and does not touch the real merits of the case. Still, if it rests on sound legal principles, it is the duty of the court to give effect to it. It is undoubtedly the general rule of law that, where the parties have made an express contract, the law will not imply one. But this rule is not inflexible, and, like most general rules, is subject to exceptions. Thus it has been held that, where

the special contract is not under seal, the plaintiff has his option, under some circumstances, either to declare on the implied promise, or to set out the special contract in his declaration. *Tousey v. Preston*, 1 Conn. 175. An action for money had and received will lie on a promissory note or bill of exchange, and yet there are express contracts. *Pitkin v. Frink*, 8 Metc. (Mass.) 12; *Henschel v. Mahler*, 3 Denio (N. Y.) 428. It is also a reasonable and well-recognized principle of law, settled by numerous decided cases, that where there is an express contract of indemnity, and by its terms it contains nothing more than the law would imply, it is optional with the plaintiff to declare in general *indebitatus assumpsit* for money paid, or upon the special contract.

This question arose in *Gibbs v. Bryant*, 1 Pick. (Mass.) 118, where a written promise of indemnity had been given to the plaintiff by the defendant; and, upon objection by the defendant that there was a special agreement which ought to have been declared on, the court say: "This objection cannot avail the defendant because the written contract produced contained nothing more than what the law would imply. The right of action rests upon the payment of money for the use of the defendant. The law raises a promise, and the plaintiff may make use of his written contract or not, as he pleased. If there is anything in the written promise to contradict the implication of law, the defendant may show it." * * * "On this branch of the case, then, we hold that the action is well maintained, notwithstanding the existence of the special contract of indemnity, and the omission to set it out in the declaration; and the objection that the action should have been brought on the express contract is therefore overruled." The following cases sustain the same principle: *Colburn v. Pomeroy*, 44 N. H. 23; *Rushworth v. Moore*, 36 N. H. 195; *White v. Leroux*, 1 Moody & M. 347, 22 E. C. L. 331; *Williamson v. Henley*, 6 Bing. 299, 19 E. C. L. 89; *Pownal v. Ferrand*, 6 Barn. & C. 439, 13 E. C. L. 232, 233; *Keyes v. Stone*, 5 Mass. 394. The relation of the present parties in reference to the note upon which the indemnity was given, was such as would in law raise an implied duty or obligation of indemnity as strong as where a receiptor, upon request, had delivered up property to the owner against whom suits had been commenced. The defendant in the one case had no

right to the property; in the other, no right to the money or note; and the contract of indemnity in both cases contained no more than the law would imply.

The plaintiff alleges that he has paid so much money for the use of the defendant. To sustain this allegation it is necessary for him to show that the money was paid at the defendant's request, either express or implied. "The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference. * * * In every case, therefore, in which there has been a payment of money by the plaintiff to a third party at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, this form of action is maintainable." *Brittain v. Lloyd*, 14 Mees. & W. 773. And the doctrine of the courts is that where the plaintiff shows that he, either by compulsion of law, or to relieve himself from liability, has paid money which the defendant ought to have paid, this count will be sustained. 2 Greenl. Ev., sec. 114; *Nichols v. Buchnam*, 117 Mass. 491. In such case, said Lord TENTERDEN, C. J.: "I am of the opinion that he is entitled to recover upon the general principle that one man who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter; and I think that money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it." *Pownal v. Ferrand*, 6 Barn. & C., 439, 13 E. C. L. 231. * * *

Judgment for plaintiff for \$479, and interest thereon from the date of the writ.

FITZGERALD v. ALLEN.

Supreme Judicial Court of Massachusetts. 1880.

128 Massachusetts, 232.

Contract in three counts. The first count was on a written contract, by the terms of which the plaintiff agreed to lay all the concrete required on "Section A" of the Sud-

bury River conduit for the sum of seventy-five cents per cubic yard, and to furnish all tools and labor necessary to do the work; the defendants agreed to furnish the materials for the work, which was to be done according to the plans and specifications for "Section A," and to the full satisfaction of the engineers and inspectors and entire acceptance of the Boston Water Board; any work not done to their satisfaction to be taken up and relaid at the expense of the plaintiff; the first full month's estimate to be held by the defendants as security for the faithful performance of the work; and the defendants reserved the right to cancel the contract, if so ordered by the engineer. The second count was on an account annexed for extra work done under the contract. The third count was on a *quantum meruit* for work done under the contract up to the time when it was cancelled by the defendants.

At the trial in the Superior Court, before PUTNAM, J., the plaintiff did not claim to recover on the first count.

It appeared in evidence that the defendants had contracted with the city of Boston to build "Section A" of the Sudbury River conduit, and the work covered by the plaintiff's contract was a portion thereof; that by the contract with the city the defendants were bound to build the section to the entire acceptance of the Boston Water Board, and to take up and rebuild any part of it, at their own expense, that might be directed by the board at any time before the final acceptance by them, and the city retained fifteen per cent. of the contract price to secure performance; that the first month's estimate of work done under the plaintiff's contract amounted to \$192, and this sum had been retained by the defendants under the provisions of the contract until the work should be accepted by the Water Board, which had never yet been done; that the engineer had ordered the discharge of the plaintiff, because he was not satisfied with his work; and that the section had not been completed, and, by the terms of the defendants' contract with the city, it was not to be accepted until the whole of it was completed.

The defendants contended that the action could not be maintained upon the *quantum meruit*, or not until the whole work was completed and accepted by the Boston Water Board; and that in any case they were entitled to retain the amount of the first month's estimate until the

whole work was completed and passed upon by the Water Board.

The judge instructed the jury to find the whole amount due the plaintiff, and deduct therefrom \$192, the amount due for the first month's work. The jury found, that, after deducting the \$192, there was due to the plaintiff \$111.78; they also found, specially, that the value of the work and materials furnished by the plaintiff before his discharge was worth the amount claimed. The plaintiff alleged exceptions to the above ruling.

It was agreed that, if the plaintiff was entitled to recover on the third count, and the ruling of the judge directing the jury to deduct the amount of the first month's estimate was incorrect, the verdict of the jury should be amended and stand for the sum of \$303.78.

LORD, J.: It was error in the presiding judge to direct the \$192 to be deducted from the value of the labor and materials. The plaintiff commenced to work under a written contract; and, while that contract was in force, his rights, remedies and liabilities were all to be determined by the terms of that contract; but, when that contract was wholly terminated, his rights would depend upon the mode in which it was terminated. It may have been terminated by his voluntary refusal to continue to perform it, or by the absolute prohibition of the defendants to permit him to perform it, or by his absolute inability, by act of God or otherwise, to continue its performance, or by the mutual consent of the parties, or by a termination, as in this case, under a power reserved by the terms of the contract itself.

The rule laid down in *Hayward v. Leonard*, 7 Pick. 181, has been constantly recognized by this court, and has been approved as often as recognized, as founded in right and equity. *Hayward v. Leonard* was followed by *Smith v. Lowell Meeting-House*, 8 Pick. 178, *Moulton v. Trask*, 9 Met. 577, *Snow v. Ware*, 13 Met. 42, and *Atkins v. Barnstable*, 97 Mass. 428. The result of the cases is, that, if the special contract is terminated by any means other than the voluntary refusal of the plaintiff to perform the same upon his part, and the defendant has actually received benefit from the labor performed and materials furnished by the plaintiff, the value of such labor and materials may be recovered upon a count upon a *quantum meruit*,

in which case the actual benefit which the defendant receives from the plaintiff is to be paid for, independently of the terms of the contract. The contract itself is at an end. Its stipulations are as if they had not existed. But this does not imply that the contract may not be put in evidence, and its terms referred to, upon the question of the real value to the defendant of the plaintiff's labor and materials. If the time of performance is extended very far beyond the time fixed by the contract, if the materials furnished are of a very different quality from that provided for by the contract, these facts have necessarily a bearing upon the real value of the services and labor. The original contract price, too, is an important element in determining the value of the labor and materials; and the proportion in value which the work done bears to the whole value of the contract labor and materials is also important in determining the *quantum meruit*.

It follows that, upon the authorities in this Commonwealth, the plaintiff was entitled to recover what, under all the circumstances of the case, his labor and materials were actually worth. And, as we understand that no objection was made by either party to the rules which the presiding judge laid down to guide the jury in determining the value of the labor and materials, there was no other error in the trial than the deduction of the \$192; and, by the agreement of the parties, as it appears by the bill of exceptions, the verdict is to be amended by the addition of that sum, and judgment is to be entered for the amount of the amended verdict.

*Judgment accordingly.*⁵²

52. *Recovery may be in excess of contract price.* This necessarily follows from the theory of the action upon a *quantum meruit*. An excellent statement of the argument is found in *Philadelphia v. Tripple* (1911) 230 Pa. St. 480, as follows: "Let it be assumed that, in an extreme case, a builder has actually expended in the course of his work a sum in excess of the contract price and has not yet completed performance. If under such circumstances, the builder finishes his work, the owner, upon paying the contract price, will receive the benefit of a large expenditure actually made, in return for the payment of a smaller sum of money. This result, which may well involve a hardship upon the builder, is made necessary by a proper regard for the contractual rights of the owner. The owner has made a valid contract, and this contract must be protected and enforced even if the builder suffers.

"Let it be supposed, however, that the owner, who finds himself in this position of advantage, voluntarily puts an end to his contract rights in the premises. This in legal effect he does if he himself breaks the contract or discharges the builder from his obligation to perform it. The situation

which then presents itself is one in which the builder has in good faith expended money in the course of work done for the benefit of the owner, and has, in the absence of contract, an equitable claim to be reimbursed. The owner, on the other hand, has deprived himself of the legal right which would have sufficed to defeat the equity. He accordingly stands defenseless in the presence of the builder's claim.

"* * * How can the plaintiff's claim for disbursements actually made be met by the limitation contained in a contract, unless the defendant retains the right to enforce the contract? And how can it be contended that the defendant retains such a right when the contract has been discharged by his own act? It may well be that a plaintiff, upon defendant's breach may offer the discharged contract as evidence of the value of that for which he is seeking recovery. The plaintiff in such a case has not broken the contract; he may fairly contend that its terms are at least an admission by the defendant which the jury should take into consideration. But where the defendant undertakes to limit the plaintiff's recovery by treating the contract price as a limitation upon such recovery, he is asserting a right under the very contract which he himself has discharged."

See Keener on Quasi-Contracts, chapter V, for a full discussion of the question of defendant's liability in general *assumpsit* when he is himself in default under a contract.

VILES v. BARRE & MONTPELIER TRACTION & POWER COMPANY.

Supreme Court of Vermont. 1906.

79 Vermont, 311.

HASELTON, J.: In June, 1897, the plaintiff and the defendant entered into a written contract by the terms of which the plaintiff agreed to furnish, every day in the year for a period of five years, electrical power to the defendant sufficient for the operation of its electric railway between Montpelier and Barre, and the defendant agreed to pay for such power at a price named, in monthly installments.

The contract provided that the plaintiff should not be responsible to the defendant for damage resulting to it "from interruptions to its traffic on its electric railways caused by fire, flood, tempest, riots, or a public enemy."

It appeared that in 1899, from August 19 to September 1, inclusive, the plaintiff during some portions of each day but one, failed to furnish the amount of power which under his contract he was bound to furnish, and it further appeared that during said days the defendant availed itself of power furnished, for the purpose of operating its road when it could, but that in consequence of the shortage of

power the operation of the road was from time to time necessarily suspended, and the defendant's cars were at a standstill.

September first the defendant sent the plaintiff a written notice stating that on account of the plaintiff's breach of the contract in failing to furnish the power therein provided for, the defendant, after the delivery of the notice, would treat the contract as ended and would neither take, accept nor pay for any more power under the contract. It appeared that this notice was received by the plaintiff in the morning of September second, and that thereafter no power was taken by the defendant from the plaintiff.

All the power taken by the company up to July 1, 1899, had been paid for, and in this case, which is a consolidation of two suits, recovery was sought for the power furnished on and after that date.

The plaintiff had fallen short of compliance with the contract. He could, therefore, recover, if at all, only upon such a showing as would entitle him to recover *quantum meruit*. The plaintiff, subject to objection and exception, introduced evidence tending to show that his failure to fulfill the contract was not wilful, but that it resulted while he was endeavoring in entire good faith to perform according to the exact terms of the contract. His plant was operated by water power, and some of the evidence objected to tended to show that his failure was the result of an extraordinary and unforeseen drouth. It appeared that he had other patrons besides the defendant, and some of the evidence objected to tended to show that the wants of these patrons were not allowed to hinder him in his endeavors to supply the defendant; in other words, that he gave the defendant a preference over his other patrons. Some of the evidence objected to was to the point that after the shortage occurred or became imminent an auxiliary steam power could not have been established in time to relieve the situation. All this evidence was rightly admitted. Though the plaintiff had broken his contract, he had furnished power which the defendant had taken and used. In the nature of things there could be no rescission.

In the circumstances of the case, if the plaintiff could satisfy the jury that he had endeavored in entire good faith to fulfill the contract to the letter, then he was entitled to

a *quantum meruit* recovery unless the amount of damage resulting to the defendant from the breach of contract was such as to prevent such recovery.

The common-law rule which sometimes worked hardships undeserved and unsalutary has been somewhat relaxed, but good faith in endeavoring to perform fully and exactly is essential to a *quantum meruit* recovery in a case like this. In such a case, unless the party in default has in good faith endeavored to accomplish full performance he deserves nothing. To hold otherwise would be to encourage a disregard of contract obligations; while so to hold is to enforce the law of contracts as rightly understood, for of this law there is no better definition than that of Sir Frederick Pollock who says: "The law of contract may be described as the endeavor of the state, a more or less imperfect one, by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right mindedness." Williston's *Wald's Pollock on Contracts*, 1.

The evolution and establishment in this State of the rule which now obtains here in a case such as the plaintiff's evidence tended to make, may be sufficiently traced through the following cases: *Dyer v. Jones*, 8 Vt. 205; *Gilman v. Hall*, 11 Vt. 510; *Fenton v. Clark*, 11 Vt. 557; *Ripley v. Chapman*, 13 Vt. 268; *Barker v. Troy and Boston R. R. Co.*, 27 Vt. 780; *Brackett v. Morse*, 23 Vt. 557; *Hubbard v. Belden*, 27 Vt. 645; *Swift v. Harriman*, 30 Vt. 608; *Bragg v. Bradford*, 33 Vt. 38; *Eddy v. Clement*, 38 Vt. 486.

Some of the cases cited above speak of substantial performance as an element of recovery; but as is pointed out in *Drew v. Goodhue*, 74 Vt. 437, 52 Atl. 971, the phrase "substantial performance" is used in two senses. That it has a double and so a confusing use is made altogether clear by the opinion in *Manning v. School District*, 124 Wis. 84, 102 N. W. 356. In some of the cases it means full performance according to the fair intent of the contract, and permits recovery on the contract without recoupment. But as used in the cases relevant to the question here, it means something distinctly short of full performance, as the facts of the cases show, and includes such performance as was in this case shown to have been rendered down to

the time when the defendant elected to treat the contract as at an end.

* * * * *

Dermott v. Jones, 2 Wall. 1, a case which arose in the District of Columbia, is analogous to this. That was a case of failure to perform all the undertakings of an entire contract. The court held that though the failure was in consequence of great and unforeseen difficulties the plaintiff below was not excused from doing what he had undertaken to do; but the court were of opinion that he was entitled to recover subject to the defendant's right to recoup, a right which had been denied in the trial court. The court further expresses itself upon several questions not necessary to the decision but likely to arise on a new trial of that case. What is thus said is in harmony with the doctrines which the court of this State has from time to time applied. The court say that recovery cannot be had by one who has wilfully left a contract unfinished; that good faith is essential to recovery by one who has not fully performed; that the suit in case of incomplete performance should be not on the special contract but on the common counts in *indebitatus assumpsit*, but that nevertheless the contract should be produced on trial. Finally the court say: "There is great conflict and confusion in the authorities upon this subject. The propositions we have laid down are reasonable and just and they are entertained by a preponderance of the best considered adjudications." A lengthy note to *Hayward v. Leonard*, 19 Am. Dec. 272, recognizes the conflict and confusion of authorities, many of which are reviewed, but in closing the note Mr. Freeman says: "This doctrine seems to be recognized and to be growing in favor—where under a special contract a party has in good faith bestowed some labor or parted with some articles to the benefit of another who has as a matter of fact enjoyed the benefit of the labor or the articles, whether voluntarily or involuntarily, and where the incomplete performance has not been the result of the party's own provoking or of causes which he might with ordinary diligence have provided against, the one receiving the benefit must pay therefor." What is said in the above quotation about liability in case of the involuntary enjoyment of a benefit is a matter to be considered when occasion for its consideration arises; but here the matter of the involuntary

enjoyment of a benefit is not involved. The defendant voluntarily took and used the power for which the plaintiff seeks to recover pay.

* * * * *

In argument in this court counsel for the defendant treat the case largely as if it were an action on the special contract. They point to the facts that the contract was introduced in evidence by the plaintiff and that the plaintiff introduced evidence tending to show the reasons why the contract was not fully complied with. But in order to a *quantum meruit* recovery the contract and these reasons were needed in the case. In no state of the evidence could the plaintiff deserve to recover more than the contract price for power furnished, and he was bound to show why he had not fully performed according to the terms of the contract in order that the question of his good faith in endeavoring fully to perform might be determined.

Fully to meet the objection to the form of the action it should be said that a technical *quantum meruit* count is not necessary to a recovery *quantum meruit*. Such a recovery may be had under the common counts in *indebitatus assumpsit*. 1 Chit. Pl. 337; 2 Saunders, William's Ed. 122a, n. 2.

The case was tried upon the correct theory that since the plaintiff in any view of the evidence had broken his contract, the defendant was entitled to recoup its damages resulting from the plaintiff's breach. In connection with its evidence on the question of such damages the defendant made an offer which, in substance, was an offer to show that in consequence of the failure of the plaintiff to furnish power according to the contract during the period from August 11 to September 1 inclusive, it suffered a loss of patronage and so of earnings during the month of September. Evidence under the offer was excluded, and we think that its exclusion was substantial error. The damage offered to be shown was such as might naturally result from the cause to which the defendant would attribute it and the defendant was entitled if it could to introduce evidence which came up to its offer. The defendant had a right to the same latitude in showing its damages for the purpose of recoupment that it would have had in an action to recover damages for a breach of the contract, note to

Van Epps v. Harrison, 40 Am. Dec. 314, and this being so, the evidence offered as above stated should have been received.

* * * * *

*Judgment reversed and cause remanded.*⁵³

53. In the note to *Hayward v. Leonard* (1828) 7 Pick. (Mass.) 181, in 19 American Decisions, 272, referred to in this case, Mr. Freeman says: "There is, perhaps, no more vexatious question in the adjustment of the rights of parties to contracts than in determining what, if any, compensation should be paid to one who, in pursuance of the terms of a special contract, has parted with some value, or bestowed some labor to the benefit of another, but has failed to comply with the requirements on which he has engaged that payment therefor shall depend. By the strict rule of the common law, where one had contracted to deliver certain described articles within a certain period, and payment was not to be made until the entire delivery, or to serve another for a specified time for a compensation for the whole period to be paid at its close, or to perform labor and furnish materials of a stipulated quality and quantity, to be paid for at the completion of the work, it was a settled rule that the full performance on the one part was a condition precedent to the right to recover for the services performed or articles furnished. For a part performance no recovery could be had. This was said to be of the nature of entire contracts, that he who asked any benefit under them must first show that he himself was not in default. The rigor of this rule has been much relaxed in different States of the Union, though in many it is still strictly enforced. A tendency, however, is observable in recent adjudications to administer an equitable relief to parties, rather than to hold them to the very letter of their engagements."

See Keener on Quasi-Contracts, chapter IV, for a full discussion of the doctrine of the right to sue in general *assumpsit* when the plaintiff is in default under a contract. The question is largely one of substantive law rather than procedure.

CHAPTER II

THE NATURE AND PURPOSE OF PLEADING.

GOULD ON PLEADING.

CHAPTER I.

Sec. 1. Pleadings are the mutual altercations of the parties to a suit, expressed in legal form, and in civil actions reduced to writing. In a more limited sense, however, "the pleadings" (in the *plural*) comprehend only those allegations, or altercations, which are *subsequent* to the count, or declaration. In England, these altercations were anciently *oral*; having been offered, *viva voce*, by the respective parties or their counsel, in open court; as is still, generally done, in the pleadings on the part of the defendant, or prisoner in *criminal* prosecutions. And hence it is, that in the *Norman* language, in which most of the ancient books of the English law are written, the pleadings are frequently denominated the *parol*: Though for centuries past, all pleadings, in civil actions, have been required to be *written*. In some instances, however, the term *parol* is still used to denote the entire pleadings in a cause: As when in an action, brought against an *infant heir*, on an obligation of his ancestor's, he prays that the *parol may demur*; i. e. that the pleadings may be stayed, till he shall attain full age.

Sec. 2. The mutual altercations, which constitute the pleadings in civil actions, consist of those formal allegations and denials, which are offered, on one side, for the purpose of maintaining the suit, and on the other, for the purpose of defeating it; and which, generally speaking, are predicated only of matters of *fact*.

Sec. 3. For pleading is, practically nothing more than affirming or denying, in a formal and orderly manner, those *facts*, which constitute the ground of the plaintiff's demand, and of the defendant's defense. Pleading, therefore, consists merely in alleging matter of *fact*, or in denying what is alleged as such by the adverse party.

Sec. 4. But in the theory, or *science*, of pleading the averment of facts, on either side, always presupposes some principle, or rule of *law*, applicable to the facts alleged; and which when taken in connection with those facts, is claimed, by the party pleading them to operate in his own favor. For all rights of action, and all special defenses, result from matter of fact and matter of law combined. And hence, in every declaration, and in all special pleading, some *legal* proposition (i. e. some proposition consisting of matter of *law*), though not in general *expressed* in terms, by the pleader (because the court is supposed judicially to know it), is always, and necessarily, *implied*, or—to use the language of grammarians—*understood*.

Sec. 5. For it would be obviously to no purpose, for either party to state facts, of which no principle of *law* could be predicated in his favor. Indeed, all that a party submits to the *court*, by alleging facts, is their legal operation: And for the purpose of deciding what their operation in law is, the rule of law, in virtue of which the pleader claims the matter of fact alleged by himself, to be in his favor, must always be *tacitly supplied*, or understood.

Sec. 6. By contemplating the subject in this point of view, we are enabled to apprehend the striking propriety and full import of Lord MANSFELD'S remark, that "the substantial rules of pleading are founded in strong sense, and the soundest and closest *logic*." For those rules, when considered in their proper connections and dependencies, will be found to involve a connected, methodized body of principles, constituting a complete and coherent system of *legal logic*: A system, artificial indeed in its form and structure; but admirably adapted to the important ends of *simplicity, uniformity and certainty*, in the modes of administering justice.

Sec. 7. For the purpose of explaining and illustrating this view of the subject, we may observe, that all pleading is essentially a *logical process*. And by analyzing a good declaration, or any good special pleading, if we take into view, with what is expressed, what is necessarily supposed or implied; we shall find in it the elements of a good *sylogism*: All good pleading being in substance a *sylogistic* process; though abridged in form, like some of the *sylogisms* of the schools: So that not only every good declaration, but all good special pleading on either side, in each

successive stage of the pleadings, is essentially a good *syllogism*.

Sec. 8. Thus in an action, brought for a trespass committed upon land, the declaration may be presented in the following form: "Against him, who has forcibly entered upon my land, I have a right by law, to recover damages: The defendant has forcibly entered upon my land: Therefore, against him I have a right, by law, to recover damages." In the example here given, the first or major proposition asserts the *legal* principle, on which the plaintiff founds his claim: The second, or minor, alleges the matter of *fact*, to which that principle is to be applied, in the particular case: The conclusion is the legal inference, resulting from the law and fact *together*, as they appear in the premises. And the judgment of the court (if for the plaintiff), is a *re-affirmance of this conclusion*, together with an award, or sentence of *recovery* in pursuance of it.

Sec. 9. In the case now stated, the plaintiff's alleged right of recovery may be contested, by a denial of either of the three propositions, which constitute his declaration. And as the denial of either of them is, in effect, a complete denial of the plaintiff's whole claim, the defendant is not allowed (by the rules of the common law), to deny more than one of them. For if he can successfully deny any one of them; he will, by so doing, attain every object, which he could have proposed in denying them all.

Sec. 10. If, then, the defendant would deny the major, or first proposition above stated, which consists of matter of *law*, he must do it, by tendering what is called an *issue in law* which is merely a technical denial of some *legal* proposition, or supposed rule of law. The minor or second proposition in the declaration—as it consists only of matter of *fact*—must be denied, if at all, by what the law denominates an *issue in fact*; or, more strictly speaking, by *tendering* an *issue in fact*—which is the legal mode of denying by plea, what has been alleged, as a matter of fact, on the other side. But assuming the major to be correct in principle, and the minor true in point of fact (upon which supposition neither of them can be successfully denied); the conclusion must inevitably follow, unless the defendant can repel it, by alleging some *new* matter, (i. e. some distinct collateral fact), which is inconsistent with it, and which therefore *by consequence* implies a denial of it:

There being no form of *direct negation*, in which the conclusion can be distinctly answered.

Sec. 11. Let it be supposed, then that in the case just stated by way of example, the plaintiff's premises are both undeniable; but that he has released his cause of action to the defendant, and that the release is the particular fact, or new matter, upon which the defendant relies, for defeating the suit. Under these circumstances, the defendant's plea, or defense, if reduced to a syllogistic form, will stand thus: "If he, upon whose land I have forcibly entered, releases to me his right of action for such entry; he has thenceforth no right by law to recover damages for it, against me. But the plaintiff has released to me his right of action, for my entry upon his land: Therefore he has, by law, no right to recover damages for that cause, against me."

Sec. 12. To this defense the plaintiff has now, in his turn, a right to reply, by denying either of the three propositions advanced by the defendant. But if he admits both of the defendant's premises; or if, as we are now assuming, he cannot successfully deny either of them; his suit must of course fail, unless he can destroy the defendant's *conclusion*, by some new matter of fact which will be, in legal effect, a denial of it.

Sec. 13. For the purpose then of carrying this process one stage further, let us suppose that the release, pleaded by the defendant, was extorted from the plaintiff by *duress*; and that this fact is the *new matter*, by which the plaintiff proposes to overthrow the defendant's conclusion. The plaintiff's reply may, upon this state of facts, be resolved into the following syllogism: "A release extorted from me, by *duress*, does not in law destroy any pre-existing right of mine, to recover damages; But the release, pleaded by the defendant, was extorted from me by *duress*; Therefore, that release does not destroy my right by law to recover damages against him."

Sec. 14. It is now necessary for the defendant, if he persists in denying the plaintiff's claim, to contest this reply; and this he may do, by denying either of the three propositions, of which it consists. But assuming, as in the preceding stages of this illustration, that neither of the *premises* can be safely denied, the consequence must be, that the plaintiff will prevail unless the defendant can, on

his part, allege some further new matter, which may destroy the plaintiff's *conclusion*. And the pleading of such new matter, of whatever facts it may consist, will contain the elements of another syllogism—which the plaintiff will be at liberty to answer, by another still; and the same syllogistic process may be repeated, by the parties, alternately as long as there remains new matter to be alleged on either side.

Sec. 15. For, that both parties may respectively have the full benefit of pleading whatever the nature and exigencies of the case, on their respective sides, may require, it is obvious that each must be at liberty to answer the allegations made against himself, by denying, at his election, *either* of the three propositions contained in those allegations: In other words, each party must be at liberty to deny whatever he considers as false, either in law, fact or inference, in his adversary's pleading. Each party, therefore, had a right to allege *new matter*, in any stage of the pleadings, as long as he has occasion to answer new matter—i. e. as long as *such* matter is alleged against him. And thus the right of *electing* between the three regular modes of meeting his adversary's allegations, is continued to each party, until one of the *premises* in the pleading on one side, is directly denied on the other; or (to substitute legal, for scholastic language), until the pleadings terminate in the tender of a proper *issue*, in law or in fact.

Sec. 16. An *issue*, of either kind, precludes the allegation of further new matter on either side and thus regularly closes the pleadings. For before any issue can be tendered, both parties will necessarily have an opportunity to allege whatever the nature of the case, on either side, may require. And as the whole controversy, which is the subject-matter of the pleadings, is by the issue, reduced to some one point of fact or law; no necessary or useful purpose can be attained, by carrying the pleadings further. For the question, upon which the contest depends, is now distinctly presented by the issue, and ripe for determination. And it only remains for the court, or the jury, to decide the point in issue, and for the former to render judgment. If the issue be taken upon matter of *law*, it is to be determined by the court—if upon matter of fact, it is in general, though not universally, to be tried by the jury: It being the province of the former to decide questions of *law*, and of

the latter, ordinarily, to ascertain matters of *fact*. And the issue, whether in law or fact, being decided, the judgment of the court, which is merely the sentence of the law, deduced from the facts ascertained, must follow in favor of that party who appears, from the whole record, entitled to it.

Sec. 17. From this very general outline, it will be apparent that all pleading is a *logical* process. And the great object of the process is to facilitate the administration of justice, by simplifying the grounds of controversy, and ultimately narrowing down the contest to a single and direct affirmative and negative—i. e., to some definite point of law or fact, affirmed on one side, and denied on the other.

Sec. 18. By *special* pleading, is meant the allegation of *special* or *new* matter, as distinguished from a direct *denial* of matter previously alleged on the opposite side.

Sec. 19. The matter of *fact*, which, in the preceding illustration, constitutes the subject of the minor proposition, is, in the established forms of pleading, always expressly alleged: Since the *facts*, upon which the complaint or defense is founded, are supposed to be unknown to the judges. The conclusion, or third proposition, in the syllogistic process, is also expressed, in the existing mode of pleading, either by the *demand*, which the plaintiff makes of damages, debt, or other thing, on the one hand, or by the defendant's *prayer of judgment* against the plaintiff, on the other. For it cannot appear, from facts stated *alone*, what benefit the pleader proposes to claim from them; and he can, therefore, derive from them no advantage which he does not claim from them, in his pleading.

Sec. 20. But as has been already suggested, the *principle*, or rule of law, of which we have represented the major proposition to consist (and which, according to ancient usage, was, in certain cases always recited, or formally alleged by the pleader), is now, in general, not actually *expressed* in the pleadings, in any form. For the judges, whose province it is to decide upon the legal sufficiency of all pleadings, are presumed to *know judicially*, what the law, upon any given or alleged state of facts, is: And the nature of the *facts*, actually alleged on either side, taken in connection with the *demand* laid in the declaration, and with the *prayer of judgment*, in the subsequent pleadings,

will, in every case, and with perfect certainty, indicate the supposed rule of law upon which the pleader relies, as his major proposition. And in this manner, that proposition, though not expressed in terms, is necessarily understood and tacitly supplied.

Sec. 21. Thus, in the example already given, of a declaration in trespass, the plaintiff, in alleging that the defendant has forcibly entered upon his land, and demanding damages for that cause, assumes and tacitly asserts the general principle, that he, upon whose land such an entry has been made, has a right by law to recover damages against him who made it. For unless that principle of law were tacitly supplied, or presupposed, the averment of the defendant's entry, and the demand of damages, which follows it in the declaration, would be altogether unmeaning and nugatory: Since no right of action could result from the defendant's act, if no such legal principle existed.—And this principle, or the proposition which would express it, is as clearly indicated by the matter of fact alleged, and the demand made in the declaration, and may therefore be as easily apprehended and applied, as if it had been expressly and formally stated.

Sec. 22. The object, thus far proposed, has been to exhibit a general analysis of the law of pleading, considered as a *science*, or *system of principles*. And though the scholastic terms and forms, which have been introduced for this purpose, are unknown in the established language and practice of pleading; yet the essential properties and the results of the preceding syllogistic process, though differently expressed, are in effect the same as those of the less scholastic modes of pleading, adopted by the common law.

Sec. 23. Thus, an issue in law which, in the foregoing analysis is called a *denial of the major proposition* of the adverse party, is described in legal language, as an *admission of the facts* alleged by that party, but a *denial of their operation* in his favor. These different terms however express, in effect, one and the same thing—or rather, the operation thus differently described, is essentially one and the same.

Sec. 24. Thus also, the *new*, or *special* matter, which in the foregoing analysis is called a denial of the adverse party's *conclusion*, is, in legal language, denominated matter of *avoidance*—i. e., matter which, admitting both of

the other party's premises, avoids or repels, in the particular case in question, the *consequence*, or *inference*, which would otherwise result from them. And that inference is, universally, the *sylogistic* conclusion in the adverse party's pleading, if his pleading be reduced to a syllogism. It is therefore manifest, that matter of *avoidance*, and matter which, in the syllogistic formula, goes in denial of the adverse party's *conclusion*, are in substance one and the same thing.

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CAMPBELL v. WALKER.

Superior Court of Delaware. 1910.

1 Boyce, 580.

Mr. Justice WOOLLEY delivered the opinion of the court.

The first count of the declaration charges that "the defendant, so negligently and carelessly operated and ran his automobile over and along one of the public roads of New Castle County * * * while the said plaintiff was then and there traveling along the said public road, riding in a vehicle drawn by a horse which was drawn then and there with due care and caution, * * * and that by reason of the said negligent and careless running of the said automobile the said vehicle was struck from the rear by the said automobile and by means of the said collision the said plaintiff was thrown out of the said vehicle," and injured. To this count, the defendant demurred specially, stating several causes of demurrer.

The substance of the count is, that the defendant so negligently and carelessly operated his automobile that it struck the rear of the plaintiff's vehicle, and by reason of the collision she was injured. The substance of the demurrer is that the count does not show the facts and circumstances of the collision with a particularity sufficient to enable the defendant to know what the plaintiff proposes to prove, and that the count does not contain an allegation of negligence sufficient to apprise him of the acts of negli-

gence that it calls upon him to defend. The issue of law raised by the demurrer, therefore, is whether the first count of the declaration is such a specification of the facts and circumstances which constitute the plaintiff's cause of action as requires an answer by the defendant.

It has been long and firmly established in Delaware, that the rules and principles of common-law pleading as they existed at the time of our independence, excepting so far as they may have been changed or modified by constitution, or statutory provision, constitute the system of pleading employed by the courts of this State. (*Donahoe v. Star Pub. Co.*, 3 Penn. 545.) As elementary principles of that system, it was announced in the very first of our State reports, that "The object of pleading is to reduce the controversy to certain and precise issues of law and fact, on which, as containing the pretensions or claims of the parties, the opinion of the court and jury may be taken, and a decision had in accordance with the principles of justice" (*State v. Collins*, 1 Harr. 216), and further that "Pleadings are designed not only to put in issue single points, but to apprise the parties of what they are to come prepared to try." (*Reading's Heirs v. State*, 1 Harr. 190, 192). Pleadings, therefore, possess a double function and are designed, *first*, to ascertain and present the real points in controversy, so that the minds of the Court and jury may not be drawn off upon matters immaterial, irrelevant and unimportant to the true issue (*Easton v. Jones*, 1 Harr. 433, note A, 436), and *second*, to acquaint the opposing party with the facts that are intended to be proved in support of the issue tendered. With respect to the latter function of pleading, it has uniformly been held from the cases in 1 Harrington to *Hunter v. P. B. & W. R. R. Co.*, in 1 Boyce, that while the plaintiff is not required to make a detailed and minute statement of the circumstances of the cause of action, he must nevertheless set forth in his declaration the facts upon which he bases his action with a particularity and certainty that will reasonably inform the defendant what he proposes to prove at the trial, in order that the defendant may have a fair opportunity to meet and controvert those facts in defense. Any other rule would defeat rather than promote this object of pleading, and would make a declaration an instrument to conceal rather than to disclose facts.

The principles of pleading, consisting, as it is said, of rules founded upon good sense and formed for the furtherance of justice (*State v. Hort*, 2 Harr. 152, 156; *Easton v. Jones*, 1 Harr. 433, note A, 436), work no hardships in requiring a plaintiff to disclose the acts for which he calls upon another to respond in damages, nor are they unfair to a plaintiff, who complains of the acts of another, and who therefore should show of what acts he complains, in requiring that those acts should not be concealed by language that is vague or by terms that are general. On the contrary, the rules of pleading require, that the time, place and circumstances of the matter in action, so far as relied on and within the knowledge of the party, must be specified with a fullness and fairness that will reasonably apprise the opposing party of what he is required to meet.

A declaration is defined to be "the specification in methodical and legal form of the circumstances which constitute the plaintiff's cause of action." (Chitty's Pl. 240, 231). In making the specification of circumstances contemplated by the definition, it is held, as general rules, that (1) it is not sufficient to state a mere conclusion of law, nor (2) is it sufficient to state the result or conclusion of fact, arising from circumstances not set forth in the declaration, and (3) that it is not sufficient to make a general statement of facts which admits of almost any proof to sustain it. (*King v. W. & N. C. E. Ry. Co.*, 1 Penn. 452; *Jones v. Peoples' Ry. Co.*, 4 Penn. 201; *Riedel v. W. C. Ry. Co.*, 5 Penn. 572.)

When stripped of its formal language, the one fact stated, in the first count of the declaration is, that the defendant's automobile struck or came into collision with the plaintiff's vehicle and the one thing charged to the defendant is, that the collision occurred by reason of the defendant's negligent and careless running of the automobile. The one thing of which the defendant is certainly informed by this averment is the fact of collision, and the one thing for which he is held accountable is the cause of the collision.

While an averment of the fact of a collision, without stating the particular act of negligence that caused it, may be sufficient in those exceptional cases where by reason of the relation of the parties, the law places upon one a high duty to prevent injury to another, or where the act itself bespeaks the negligence of its cause, it cannot be held that from the mere statement of the fact of collision upon a

highway, between wayfarers with equal rights and duties, the law will infer the collision to have been the result of negligence, or the negligence to have been that of the defendant. In such cases the fact of collision is not the cause of action but the acts of negligence that caused the fact of collision, constitute the cause of action. It therefore devolves upon the plaintiff, in holding the defendant accountable for the fact of collision, which may have been the result of inevitable accident or of one of many negligent acts of either party, to disclose to the defendant the cause of the collision and to state the acts that contributed to its occurrence. The expression—"so negligently and carelessly operated and ran his automobile,"—states no fact or circumstance that fastens upon the defendant the negligence which must be shown to entitle the plaintiff to recover, (and is clearly within two of the objections before stated, in that it is a statement of a conclusion of fact, arising from acts or circumstances not set forth in the declaration, and it is a statement so general as to admit almost any proof to sustain it.) * * *

* * * The demurrer to the first count of the declaration is therefore sustained.

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CHAPTER III.

DEMURRERS.⁵⁴

SECTION 1. NATURE OF DEMURRER.

HAVENS v. HARTFORD AND NEW HAVEN RAILROAD COMPANY.

*Supreme Court of Errors of Connecticut. 1859.
28 Connecticut, 69.*

[Action for injuries sustained by plaintiff while a passenger on defendant's cars. Plaintiff alleged that his trunk was damaged through the negligence of defendant's servants, and he himself was personally injured through a wrongful attempt on the part of said servants to eject him from the train. The defendant demurred generally to the declaration; the demurrer was overruled and a hearing in damages was had, and a large amount of evidence was introduced. Counsel for plaintiff thereupon claimed that all the facts properly alleged in the declaration were admitted by the demurrer, and that none of the evidence inconsistent therewith should be considered.]⁵⁵

ELLSWORTH, J.: * * * From the finding of the superior court, although it is unnecessarily lengthy and complicated,

54. FORMS OF DEMURRERS. *General Demurrer.* "And the said C D by E F his attorney, comes and defends the wrong and injury, when, etc., and says, that the said declaration and the matters therein contained in manner and form as the same are above stated and set forth, are not sufficient in law for the said A B to have and maintain his aforesaid action thereof against him, the said C D, and that he the said C D is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore, for want of a sufficient declaration in this behalf, the said C D prays judgment, and that the said A B may be barred from having or maintaining his aforesaid action thereof against him, etc."

Special Demurrer: Proceed as in the above form for a general demurrer to the end and then add the following, "And the said C D according to the form of the statute in such case made and provided, states, and shows to the court here, the following causes of demurrer to the said declaration, that is to say, that, etc. (*here state the particular causes, and concludes thus:*) And also that the said declaration is in other respects uncertain, informal, and insufficient, etc." 2 Chitty on Pleading, 678.

55. Condensed statement of facts by the editor.

bringing up, as it does well nigh the whole case, facts as well as law, we can discover the main question in dispute, and in order to make an end of this protracted controversy, we will pass over the formal objections to the motion, and direct our attention to the principal question thus presented, deciding it in accordance with what we understand to be the law as laid down in the books.

It appears from the motion, that if the court could but consider all the testimony which had been received (and without objection), touching the character, cause and extent of the plaintiff's injuries, for which he brought suit, the plaintiff, in the opinion of the court, would be entitled to recover nominal damages and nothing more; or, in other words, that upon the entire proof he did not appear to have made out a substantial cause of action against the defendants, for their not carrying him safely and carefully from New Haven to Middletown. But if the demurrer was to be held to exclude certain material parts of the evidence from the consideration of the court because the contrary was conclusively admitted by the demurrer, then the defendants were liable for substantial damages, to be fixed by a consideration of other and distinct facts. This is the language of the court: "And if the operation of the demurrer, is such that the defendants can be permitted to show that the resistance of the plaintiff essentially contributed to the original injury, and also the other facts which were shown, and the court should be of opinion, upon the facts so shown, that such resistance was unjustifiable, and should reduce the damages to substantially nominal damages, then I find for the plaintiff to recover, and I assess the damages at \$100."

We all of us agree, that, under the circumstances, the plaintiff's resistance, after the conductor had in vain several times demanded his ticket, according to the general and proper usage of the company, was inexcusable and unjustifiable; and that if all the circumstances can be taken into account, the defendants' servants are to be regarded as having done no more, in attempting to remove the plaintiff from the car, than they had a right to do. But it is claimed on the part of the plaintiff, that, after the demurrer, the character, causes and circumstances of the injuries complained of are not fully open to inquiry. To this point then I will direct my attention. * * *

Let us consider then the main question of the case, the nature and consequences of a demurrer to the declaration in case or trespass, or in torts generally. We will then endeavor to apply the doctrine to the case on trial.

It cannot be necessary to multiply very greatly authorities on this point, since, properly understood, they are all one way—both those read by the defendants' counsel and those cited on the the other side—with one exception, in the case of the latter, which will be noticed in its place.

Gould, in his treatise on Pleading, p. 46, sec. 43, says, "A demurrer to the declaration is not classed among pleas to the action, not only because it may be taken as well to any other part of the pleadings as to the declaration, but also because it neither affirms nor denies any matter of fact, and is not therefore regarded as strictly a plea of any class, but rather an excuse for not pleading." So on page 460, "To demur is to *rest* or *pause*." And again, "A demurrer merely advances a legal proposition—it forms an issue in law; admitting the facts, so far as well pleaded, for the purpose of taking the opinion of the court, preliminarily, its language is, allowing all that is alleged to be true, there is not anything that calls for an answer, plea or defense." If this is indeed true of the declaration or of a plea, then it is advisable, all will admit, that the question of law be settled in the first instance, for thereby a protracted and expensive trial of fact may be avoided, even though in many cases relief may be had by motion in arrest or motion in error. The admission by demurrer is never, I am confident, a *rule of evidence*; nor is it so considered or treated, beyond this, that it necessarily follows from a judgment on the demurrer that there is a cause or some cause of action, but precisely what, and of how great extent, does not appear; and without additional proof the plaintiff will recover only nominal damages. The rule is modified in actions on notes, bills of exchange, and the like, but even here the amount due is not conceded by the demurrer, but the note or bill must be produced, that the real debt may appear, while the execution of the instrument is not denied. But in actions of trespass, trespass on the case, and kindred open actions, nothing is admitted beyond a cause or some cause of action, and if particular damages are not proved after judgment on demurrer, default or *nil dicit*, the plaintiff never takes more than nominal damages

Archbold, in his treatise on Practice (vol. 2, p. 10), says: "Judgment upon demurrer is interlocutory or final in the same manner and in the same cases as judgment by default is interlocutory in *assumpsit*, covenant, trespass, case, and replevin, where the sole object of the action is damages; while in debt and in ejectment, damages not being the principal object of the action, and those usually recoverable not being of sufficient consequence to warrant the expense of executing a writ of inquiry, the plaintiff usually signs final judgment in the first instance." So on page 31: "A writ of inquiry is a judicial writ directed to the sheriff, stating the former proceedings, and then saying, 'because it is unknown what damages the plaintiff hath sustained, you are commanded, by the oath of twelve honest and lawful men of your county, diligently to inquire after the same, and return the inquisition into court.'"

As the inquest is merely to inform the conscience of the court, the court may itself inquire and assess the damages, as is always done in this state. *Bruce v. Rawlins*, 3 Wils. 61, 62; *Hewett v. Mantell*, 2 Wils. 372-374; *Gould v. Hammersly*, 4 Taunt. 148; 1 Doug. 216, note. In actions on bills and notes, the inquiry is often referred to a master or prothonotary. 2 Saund. 107, note; *Napier v. Shneider*, 12 East. 420; *Gould v. Hammersly*, *supra*. But when the computation of damages is not a mere calculation, the court will not refer it to the master or prothonotary, but the plaintiff must proceed regularly with his writ of inquiry. When some difficult point of law is likely to arise in the course of the inquiry or where the facts are important, the court will let the writ of inquiry be executed before the chief justice or a judge of assize. 1 Sellon's Prac. 344. Archbold again says (p. 38), "In trespass or any other action where the damage *actually* sustained by the plaintiff is the measure of damages to be given by the jury, if the plaintiff do not prove the nature of the injury and the amount of the damages sustained by him, the jury always give nominal damages only."

Like views are to be found in 3 Chitty's General Practice, 672; 3 Blackstone's Commentaries, title "Demurrer;" 1 Chitty's Pleading, 654; Bingham on Judgments, 2, 36; Saunders' Pleading and Evidence, 953, and 3 Stephens' Commentaries, 639. The same doctrine is laid down in our own decisions. In the case of *Sturges v. Bush*, 5 Day, 452,

which was an action of account for certain enumerated articles, the plaintiff was held bound to prove before the auditors every article for which he sought damages, though the plaintiff insisted that they had all been admitted and found to have been received by the defendant to account for. The same was held in the case of *Lacon v. Davenport*, 16 Conn. 331. In the case of *Parker v. Hotchkiss*, 25 Conn. 321, it was held that a judgment between the same parties in a former case, was evidence only of what it was *necessary* for the party prevailing to prove in that case, not of what was alleged or *might* have been proved. A similar doctrine is expressed in the case of *Curtis v. Chapin*, 23 Conn. 399. In *Pease v. Phelps*, 10 Conn. 62, the court say, "A demurrer presents only an issue in law to the court for consideration; the jury having no concern with it; and although it is a rule of pleading that a demurrer admits facts well pleaded for the sole purpose of determining their legal sufficiency, yet as a *rule of evidence* it was never supposed that a demurrer admitted anything." The same was held in *Tompkins v. Ashby*, 1 Mood. & Mal. 32, in which the marginal note is, "A demurrer or plea to a bill in equity does not admit the facts charged in it, so as to be evidence against the defendant, if those facts arise in a future action between the same parties." ABBOTT, Ch. J., remarked in that case, that it was nothing more than saying that, *if the facts be so*, the defendant is not bound to answer. In *Montgomery v. Richardson*, 5 Car. & Payne, 247, it was decided that facts demurred to in one plea cannot be used as evidence of another plea. In *Bates v. Loomis*, 5 Wend. 134, it was held that in an action for an assault and battery, if the defendant does not plead but suffers a default, such default admits *an* assault and battery, but it does not admit one on any particular day, as on the day laid in the declaration, nor does it admit any circumstances laid in the declaration by way of aggravation; and without proof in such case that the injury complained of was committed by the defendant, the plaintiff is entitled to only nominal damages.

* * * * *

The claim of the plaintiff's counsel, unless we misapprehend them, is that a demurrer admits the truth of the entire declaration for every purpose throughout the progress of the case, or that every allegation which *could* have been

proved for any purpose to the jury, whether it be a part of the gist of the action or not, is to be assumed to be absolutely true, because the jury *might* have found it to be true, had they been allowed to pass upon it. This cannot be the correct rule, upon their own authorities, and it is abundantly disproved by every book of practice in the language. If, however, this is not their view, and they mean only that such facts are admitted as are essential to a recovery, then there is no important difference between them and the gentlemen on the other side, and the question becomes simply one as to the proper application of a principle of law long recognized and well established.

We will state a case or two to show how erroneous is the view that a demurrer is a rule of evidence. A person is sued in trespass for entering another's house and carrying off articles of household furniture. The plaintiff can recover, on the general issue, by proving an entry only; or, passing by the entry, as in the case of *Holley v. Brown*, 14 Conn. 255, and treating the tort as only a trespass to personal property he can recover if he proves that the defendant took away a single article only; and if, instead of going to the jury, the defendant had demurred or suffered a default, neither one of these acts specifically would be proved by the judgment, any more than it would be by a verdict had the defendant gone to the jury; and it will not be pretended that this would have been the consequence of a verdict, for neither separate act was indispensable to a recovery by the plaintiff. Again, a person is sued for an assault and battery, the pleader alleging divers special injuries, to his dress, his person, his health, etc. The plaintiff can recover upon proving only that the defendant laid his hand violently upon him. Hence, we insist that a demurrer or default prove nothing more than this; nor even this as a specific act; and nothing but nominal damages will be given unless there be further proof. The same is true where there are distinct counts in the same declaration. A demurrer in that case admits only a single cause of action, so that on a motion in arrest one good count is enough, and one tortious act in that one count is enough.

* * * * *

Following out this view of the declaration, I inquire, what are we to understand as admitted *in this case* by the demurrer? In my judgment, nothing but that the defendants

were common carriers on the road in question, and received the plaintiff into one of their cars to carry him with care and safety from New Haven to Middletown, and have failed to do it as agreed. This gives a complete cause of action. Strike this out of the declaration, and it is by no means certain that there is enough left to enable the plaintiff to recover; but with this in, and the rest stricken out, there is enough left for a good cause of action. The wrongful acts specified go only to the manner and special consequences of the defendants' default.

But, if we are wrong in our view, if the action is founded in misfeasance, rather nonfeasance, and the gist of the action is the positive acts of the defendants' agents, the result will not be essentially different; for then only one of these acts need to be proved on the general issue—the tearing the plaintiff's coat—the putting the hand violently upon his person—the raising him from the seat—or the attempt to eject him from the car; each would sustain the action, even in that point of view; and therefore only one is proved by the verdict or demurrer, and not even that specifically. May not the defendants show, on the hearing in damages, notwithstanding the demurrer, that the plaintiff's knee was not hurt at all? or if so, that it was caused by his attempt to assail the conductor, or in his twisting his limb under the seat in order to keep from being ejected from the car, or in springing over the seat to avoid the conductor? If so, and the injury to the knee may be denied and disproved, the manner and degree in which it is claimed to have been done by the defendants may be disproved; for the greater includes the less, and the proof of the manner may well show, as it did in this case, that the plaintiff himself was the author of this particular injury; and were it true that the defendants, by plea, could have set up such misconduct of the plaintiff in bar of the action, which we by no means concede, still, the entire proof being before the court, and it appearing that there had been no negligence, misconduct or fault in the defendants, it would be strange indeed for the court to adjudge the defendants to pay the plaintiff damages brought upon himself by his unpardonable contumacy and violence, when it is not found that the particular injury to the knee was caused by the defendants' agents at all.

Nor does it follow from the demurrer that the character of the scuffle in the car, when the plaintiff set the rules of the company at defiance, cannot be known and judged of and made the rule of right between the parties. It cannot be so. The demurrer cannot be allowed to clothe the acts of the defendants' agents (supposing them to be improper) with a character or quality which will not allow of a full examination of them on their merits, or which *must* exonerate the plaintiff contrary to the justice of the case, and contrary to what would have been the result in a trial on the general issue.

We advise judgment for one hundred dollars damages.

In this opinion, BINMAN, and McCURDY, JJ., concurred. SANFORD, J., dissented. STORRS, C. J., being disqualified by interest, did not sit.

Judgment for \$100 damages.

McALISTER v. CLARK.

Supreme Court of Errors of Connecticut. 1866.

33 Connecticut, 253.

Action of debt, brought under the provisions of a by-law of the city of New Haven for the prevention of nuisances, by the city treasurer, to recover a penalty of fifty dollars. This cause came before this court, at its preceding term in this county, upon a reservation for advice upon the sufficiency of the declaration, to which the defendant had demurred. (See *ante*, page 91.) After this court had advised that judgment upon that issue be rendered for the plaintiff, but before judgment had been in fact entered up in the superior court in conformity to this advice, the defendant made a motion to the superior court to allow him to withdraw his demurrer and plead the general issue. This motion the court denied, and gave judgment for the plaintiff for the full amount of the penalty. The defendant claimed on the question of damages, and offered evidence to prove, that the plaintiff was entitled to no damages, or at most to nominal damages only, but this evidence was excluded by the court as inadmissible.

HINMAN, C. J.: * * *

The penalty fixed in the by-law for the offense charged against the defendant is fifty dollars precisely. It can be no more nor less than that sum. The defendant, however, claims that on the assessment of damages, when a demurrer is overruled, the damages are always nominal, unless the actual damages are proved. That this is so in cases where the damages may vary from a nominal sum to the amount in the declaration, according as the proof may show that the plaintiff is entitled to one sum or another, is no doubt true. And in cases of this sort, as the demurrer admits only a cause of action, and does not admit any aggravated circumstances though charged in the declaration, the plaintiff will recover only nominal damages, unless he shows what the actual damages were. But in a case like this, for a precise penalty given by a by-law, there is no room for nominal damages; an admission of a cause of action is an admission that the damages must be assessed at the precise amount of the penalty.

We advise the superior court that there is no error in the judgment complained of, and that a new trial should not be granted.

COLUMBIAN GRANITE COMPANY v. W. C. TOWNSEND & COMPANY.

Supreme Court of Vermont. 1902.

74 Vermont, 183.

TAFT, C. J.: The defendant undertakes to impeach the officer's return, which is good on its face, by a plea in abatement, which is demurred to.

Nothing is better settled than that an officer's return is conclusive between the parties, except in a proceeding to set it aside. *Yatter v. Pitkin & Miller*, 72 Vt. 255, 47 Atl. 787. Mr. Gould says that a defendant cannot falsify such a return by plea in abatement, but must resort to his remedy against the officer, if it be false. Gould's Pl. c. V, § 135.

* * * * *

A demurrer admits only such facts as are well pleaded, and therefore never admits an allegation that the pleadings show the party is estopped to make, for such allegation is not well pleaded. Gould's Pl. Ch. IX, § 25. Hence, the facts here alleged in contradiction of the return, not being well pleaded, are not admitted by the demurrer and cannot be considered.

Judgment affirmed and cause remanded.

FRAZIER v. THOMAS.

Supreme Court of Alabama. 1844.

6 Alabama, 169.

The declaration has three counts; the first is trover for 50 bags of cotton; and the other two are in case for removing a quantity of cotton grown upon land leased by the plaintiff to one Barron, without paying or tendering the plaintiff, the amount due for the rent. The last count set out the use and occupation of the premises by Barron, the growing of the cotton upon the land, its liability to pay the rent and its removal by the defendant, whereby the rent was lost. It also avers that the cotton was subject to a lien of the plaintiff, and that by the removal, this lien was lost. The other count in case is similar to this, but there is no specific allegation of a lien. Both were demurred to, and overruled as insufficient.

The defendant had a verdict on an issue to the count in trover, and the plaintiff prosecutes this writ of error, and here assigns the judgment sustaining the demurrer as cause for reversal.

GOLDTHWAITE, J.: * * *

* * * * *

2. It is supposed, however, that the demurrer ought not to have been sustained, because the count contains an express averment, that the plaintiff has a lien on the cotton carried away by the defendant, and as this fact is admitted by the demurrer, the taking must be considered as wrongful. This view is not admissible, because the existence of a lien is a conclusion of the law from certain facts, and

these are necessary to be stated in order that a judgment may be formed with respect to the existence of the lien. If the precedent matter should be rejected, the count could not be sustained on the assertion that the plaintiff had a lien upon the cotton. Whether we consider the assertion that there was a lien as predicated on the facts stated, or as standing alone, the count is alike defective.

Judgment affirmed.

GRAHAM'S CASE.

Court of Claims of the United States. 1865.

1 Court of Claims, 183.

LORING, J., delivered the opinion of the court.

The case comes up on demurrer to the petition, which states that the petitioner was a laborer in the office of the Commissioner of Public Buildings, being one of the offices of the Department of the Interior, and was in the employment of the government in the city of Washington.

That by a joint resolution of Congress, No. 18, approved August 18, 1856 (11 U. S. L. 145), it was provided that all laborers in the employment of the government in the executive departments and on the public grounds in the city of Washington shall receive an annual salary of six hundred dollars each from and after July 1, 1856.

And he avers that he has been paid only four hundred and thirty-eight dollars per annum, and he claims the difference between that sum and six hundred dollars per annum for eight years and one quarter, being one thousand three hundred and thirty-six dollars and fifty cents.

The demurrer in this case is not on file, and no copy of it, either written or printed, can be found; but enough of its purport is shown by the arguments of counsel on file, and the statements of the Deputy Solicitor, to enable the court to decide the question it raised.

It was a special demurrer, and specified for cause that the petitioner was employed in a menial service in taking care of the water-closets in the Capitol, and that his compensation was specified in the act of appropriation of August 18, 1856, ch. 162, 11 U. S. L. 116, at \$438 per annum.

This states a fact not stated in the petition, viz., that the petitioner had charge of the water-closets in the Capitol; and if the defendants relied on it, they should have pleaded it, and given the petitioner an opportunity to traverse it. The demurrer, therefore, is bad, and the cause it specifies cannot be considered under it.

MORGAN v. DYER.

Supreme Court of New York. 1813.

10 Johnson, 161.

PER CURIAM. The proper course for the plaintiff, if he wishes to avail himself of the objection, that the plea was not pleaded in season, is by motion to set it aside, and not by demurrer. On demurrer, this court are to judge, from the plea itself, whether it is sound in form or substance, and not whether it was put in within the regular time for pleading such a plea. It rests in the discretion of the court to receive it, or not, even after more than one continuance between the time that the matter of the plea arose, and the coming in of the plea, and this discretion will be governed by circumstances extrinsic, and which cannot appear on the face of the plea. (*Bancker v. Ash*, 9 Johns. Rep. 250; *Morgan v. Dyer*, 9 Johns. Rep. 255.)

* * * * *

AMORY v. MCGREGOR.

Supreme Court of New York. 1815.

12 Johnson, 287.

[This was an action on the case for negligence in the transportation of goods, and in his declaration the plaintiff alleged that on the 21st day of July, 1812, he caused certain goods to be shipped on board defendant's ship at Liverpool, in Great Britain, to be carried by the defendant to New Orleans; that defendant, in consideration of cer-

tain freight, undertook and promised to safely carry and deliver the goods; that defendant did not safely carry and deliver them, but by reason of his negligence the goods were totally lost. To the declaration there was a general demurrer.]⁵⁶

PER CURIAM. This case comes before the court on a general demurrer to the declaration. And the ground upon which it has been attempted to support the demurrer is, that the day laid in the declaration is during the existence of hostilities between this country and *Great Britain*; and that, of course, the contract set forth in the declaration is void, being contrary to the laws of the United States. Without giving any opinion upon the validity of the contract, if, in point of fact, it was made at the time laid in the declaration, it is sufficient, in this case, to say, that the day being immaterial, the plaintiff would not be obliged to prove the contract to have been made on the day laid. Nothing appears upon the face of the declaration, showing the contract to be illegal or void. And it is a general rule, that a party cannot demur, unless the objection appears on the face of the pleadings. And so are all the cases referred to, and relied upon, by the defendant's counsel. In *Cheetham v. Lewis*,⁵⁷ 3 Johns. Rep. 42 and *Waring v. Yates*, 10 Johns. Rep. 119, it appears, from the declaration, when the suit was commenced and that the cause of action arose afterwards. The plaintiff must, therefore, have judgment, with leave to the defendant, however, to plead to the declaration.

Judgment for the plaintiff.

56. Condensed statement of facts by the editor.

57. In *Cheetham v. Lewis* the court said: "By the record in the present case, it appears that the action must have been commenced as early as the second Monday in November term, 1803, and that the cause of action did not arise until the 18th of November, in the same term. The action appears, therefore, to have been commenced before the cause of action accrued. (1 Tidd's Prac. 368.) Though generally, the day may not be material, yet this must always be understood with this limitation, that it be laid to be before the commencement of the suit."

**KENNON & BROTHER v. WESTERN UNION
TELEGRAPH COMPANY.***Supreme Court of Alabama. 1890.**92 Alabama, 399.*

MCCLELLAN, J.: As we construe the amended counts of the complaint, they each sufficiently aver that the plaintiffs through their agents in New York made a contract with the defendant to transmit a message from the agents to their principals at Salem, Alabama, with diligence and dispatch for a reward then and there paid by the agents for the principals, and subsequently repaid by the latter to the former; and that the defendant violated said contract in that it missent the message and failed to transmit and deliver it to plaintiffs for several days after it received the same for transmission and should have transmitted and delivered it. On the contract thus alleged, these plaintiffs may sue, and, if the evidence develops that they were disclosed to the telegraph company as the principals in the contract, they may recover against the defendant. *G. C. & S. S. Ry. Co. v. Levy*, 43 Am. Rep. 278; *Hookness v. W. U. T. Co.*, 5 Am. St. 672; *West v. W. U. T. Co.*, 7 Am. St. 520; *W. U. T. Co. v. Broesche*, 13 Am. St. 843; *Daugherty v. A. U. Tel. Co.*, 75 Ala. 168.

The breach alleged entitles the plaintiffs to recover at least the reward paid by or for them for the transmission of the message, and, eliminating this element, they would still be entitled to recover nominal damages. *W. U. Tel. Co. v. Way*, 83 Ala. 542, 562-3; *W. U. Tel. Co. v. Henderson*, 89 Ala. 510, 518; *Daugherty v. A. U. Tel. Co.*, 75 Ala. 168, 171.

It follows that whether the plaintiffs were entitled to recover the damages alleged to have resulted to them from the decline in the price of cotton between the time the dispatch should have been delivered to them and the time at which they ordered the sale of one thousand bales, the averment being that the order would have been given upon the instant of receiving the message, and was delayed three days in consequence of its nonreceipt, or not, the demurrers to the amended complaint should have been overruled. Not only

do those demurrers fail as a matter of law to answer the whole complaint so as to raise any question as to the right thereunder to recover nominal damages and the price of the message, except in so far as to assert what we have determined to be the untenable proposition that the action proceeds in the names of the wrong parties, but they are confessedly addressed only "to so much of each of said counts, respectively, as seeks a recovery beyond the price of the telegram." Causes cannot be determined by piecemeal on demurrer. The pleader must answer the whole complaint and for all purposes when he resorts to this mode of defense. When the cause of action is sufficiently stated to authorize a recovery, in this form of action counting on a single breach of contract, of any damages, a partial defense, going to a denial of the right to recover a part of the damages claimed, must be availed of and effectuated by motion to strike out the objectionable averments, or by objections to the evidence, and through instructions to the jury. *Daugherty v. A. U. Tel. Co.*, 75 Ala. 168. * * *

The court erred in sustaining the demurrers to the amended complaint, and in rendering final judgment against plaintiffs. Said judgment is reversed and the cause remanded.⁵⁸

58. But where a pleading contains distinct matters, divisible in their nature, as where several breaches are assigned in a count of a declaration, or several defenses combined in one plea, the demurrer may go to any one of the entire and distinct parts. *Douglass v. Satterlee* (1814) 11 Johns. (N. Y.) 16; *Powdick v. Lyon* (1809) 11 East, 565.

STILE v. FINCH.

Court of King's Bench. 1635.

Croke's Charles I, 381.

Action for words; and declares, they were spoken 2 Car. 1. The defendant pleaded not guilty; and it was found against him.

Adam moved in arrest of judgment, that the action is brought for words spoken six years before the action commenced; so that by the statute of limitations he was barred

of this action; and therefore the court ought not to give judgment upon this verdict for the plaintiff.

Jones and Berkley held, that the plaintiff ought to have judgment, because the defendant hath not pleaded the statute; for there may be divers causes, that he could not bring the action before this time, viz., that he was in prison, or within age, or beyond seas, or that he had sued the defendant to outlawry, and the defendant had reversed the outlawry, and this action brought within a year after the reversing of the outlawry (as in truth the case was); for then the action is well brought.

But *Adam* moved, that he should have then shewn it in his declaration. But it was adjudged for the plaintiff.⁵⁹

59. And the rule is the same whether the bar of the statute appears from the declaration or from the evidence given at the trial. If not pleaded by the defendant it cannot be availed of. *Brickett v. Davis* (1838) 21 Pick. 404; 2 Saund. 63, note 6.

TOWNSEND v. JEMISON.

Supreme Court of the United States. 1849.

7 Howard, 706.

Mr. Justice WOODBURY delivered the opinion of the court.

The original action in this case was *assumpsit*. Though the declaration contained several counts, some on a special promise and some for money paid and received, it was indorsed on the original summons, that the action was "brought to recover the sum of \$4,000 and interest at 10 per cent., paid for defendant, from 27th of January, 1840, to Mississippi Union Bank," etc., etc.

There was a demurrer and other pleadings as to this declaration, which it is not necessary to repeat, as leave was given to amend throughout; and on the 6th of December, 1842, a new declaration was filed, consisting of three special counts and the usual money counts, all of which must of course be for the original cause of action.

On the 9th of December, 1842, the defendant pleaded the general issue of *non assumpsit* to the whole declaration; and, for further plea to the three special counts, averred,

that the suit was brought to charge him for the debt of John B. Jones, and for no other purpose, and that, there being no evidence of his promise in writing, the suit was barred by the statute of frauds and perjuries. To this the plaintiff replied, that the suit was not so brought, but on original promises made by the defendant. The latter filed a general demurrer to this replication.

On the 12th of December the general issue joined as to the whole declaration appears to have been tried, and a verdict returned for \$3,451.88, for which sum, at the same term, judgment was rendered and execution issued.

Nothing further took place till June 5, 1845, when this writ of error was brought to reverse the judgment, assigning as the ground for it, that the demurrer to the replication should first have been disposed of, and that the statute of frauds pleaded in the preceding plea was a full defense to the matters alleged by the original plaintiff.

* * * The leading inquiry, then, is if enough appears in all the proceedings here to render it probable that the issue, in law no less than in fact, was in some way disposed of, though this is not, *eo nomine*, mentioned in the record. Assuredly, it is usual in this country, as a matter of practice, when there is an issue of fact and another of law in the same action, to have the question of law heard and decided first. *Green v. Dulaney*, 2 Munf., 518; *Muldrow v. McLelland*, 1 Litt. 4; Co. Litt. 72 a; Com. Dig., Pleader, Demurrer, 22. The 28th rule for the circuit courts accords with this, by directing that, in such cases, "the demurrer shall, unless the court shall otherwise, for good cause, direct, be first argued and determined," because a decision on that, if one way, that is, if in favor of the demurrer, will frequently dispose of the whole cause, and supersede the expense and necessity of a jury trial of the other issue, as well as give an opportunity to move for an amendment. 5 Bac. Abr., Pleas and Pleading, No. 1; Tidd, Pr. 476; *Dubery v. Paige*, 2 T. R. 394. Yet this course being a matter of sound discretion in the court rather than of fixed or inflexible right, it cannot always be absolutely presumed to have been pursued. See 28th Rule, *ante*, and cases before cited; 2 T. R. 394; 1 Saund. 80, n. 1. But as it is usual, and the defendant in this case did not file any exception, as if there had been a refusal by the court to decide first on the demurrer, the presumption does not seem so

strong that there had been a refusal or neglect to do it, as that the demurrer had been waived by the defendant,

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What fortifies these views is the fact that the defendant never procured a joinder to his demurrer by the plaintiff. As he interposed this defense in a special plea, and filed the demurrer to the replication, it would be material for him, if wanting a decision on them, to get the pleadings finished. He should have moved for a joinder, or got a rule for one (1 Chit. Pl. 628), and should likewise have moved for a decision on them, if desired, before a final judgment was rendered on the verdict. It is true that some books appear to consider it the duty of the plaintiff to join in a demurrer soon after it has been tendered by the defendant. But this, it is believed, generally depends on a positive rule of court, which may exist, to require it. 33d Rule of Practice for Courts of Equity, 1 How. 43; *William's Case*, Skinner, 217. And without such rule, as in this case, he may need and take time to decide on making a motion to amend, before joining; and the harshest penalty proper for delay in the joinder would seem to be, that the demurrer may be considered, when requested by the party making it, though no formal joinder has taken place. 3 Lev. 222; Skinner, 217. The omission of the defendant, then to obtain a joinder, to which he was by law entitled (1 Chit. 647; Barnes, 143), the omission to add one himself, which is sometimes permissible (5 Taunt. 164, and 1 Ark. 180), and the omission to request a decision without any joinder, as he may after much delay (Skinner, 217), all appear on the record, and look not only like a waiver of a decision on the demurrer by the defendant, but a neglect of his own duties on the subject. A waiver of a demurrer often takes place, and is, by law, permissible. 1 Tidd, Pr. 710; 1 East, 135; 2 Bibb. (Ky.) 12; 1 Burr. 321; 2 St. 1181. *Quilibet renuntiare potest jure pro se introducto*. The want of a decision would, in this aspect of the subject, seem to be by his own consent; and *consensus tollit errorem*. The course of the defendant appears to have been, practically and substantially, if not formally, an abandonment of a wish for any separate decision on the demurrer. See cases of this kind. *Wright et al. v. Hollingsworth*, 1 Pet. 165; Bac. Abr., Error, K., 5; *Vaiden v. Bell*, 3 Rand. (Va.) 448; *Patrick v.*

Conrad, 3 A. K. Marsh. (Ky.) 613; 2 Id. 227; *Casky v. January*, Hard. (Ky.) 539. As a plea of the general issue, while a demurrer is pending undisposed of, is considered a waiver of it. *Cobb v. Ingalls*, 1 Ill. 180.

* * * It strengthens these conclusions, that the original defendant seems to have long acquiesced in what he now excepts to—that he does not appear to have asked for a decision on the demurrer, to have made any complaint at the time of the demurrer not being decided, to have filed any motion about it, offered any bill of exceptions, or even brought any writ of error, till after the lapse of nearly three years. So much as to the waiver of the demurrer. But if the demurrer was not, in truth, waived or withdrawn by the defendant, or cannot be now so considered, from all which appears on the record, the presumption from all is evident, that the demurrer and special plea were actually decided on by the court, and the omission to enter it on the record may be cured by the statute of jeofails. Such a decision would have been its ordinary and proper course of proceeding.

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* * * We think that the judgment below must be *affirmed*.

HALE v. LAWRENCE.

Supreme Court of New Jersey. 1849.

22 New Jersey Law, 72.

These were actions in trespass, brought in this court.

The defendant in each of these causes, having pleaded specially in justification of the alleged trespass, the plaintiff demurred to the plea. The demurrer was overruled by this court, and judgment rendered for the defendant. The cause having been removed into the court of errors and appeals, the judgment below was there reversed, at October term, 1848, and the record remitted to this court. The entry of the judgment and the remittitur is in the following words: "It is ordered and adjudged, that the said plea of the said defendant, in manner and form aforesaid by him

above pleaded, and matters therein contained, is not sufficient in law to bar or preclude the said plaintiffs from having or maintaining their aforesaid action against him, the said defendant. And it is further ordered and adjudged, that the record and proceedings therein be remitted to the said Supreme Court, to the end that the said court may proceed therein according to law. On filing the remittitur in this court on the first day of November, in October term, 1848, the following rule was entered on the part of the plaintiffs: "On reading and filing remittiturs from the court of errors and appeals in the above causes, respectively, it is ordered, that a writ of inquiry, to ascertain the plaintiff's damages, issue in said causes, respectively, unless the defendant amend his plea within thirty days after notice of this rule." On the 30th of November, the defendant filed, in each case, the general issue and two special pleas in bar. The plaintiff, after the expiration of thirty days, sued out a writ of inquiry, treating the pleas filed by the defendant as a nullity. The defendant now moved that the pleas so filed do stand as pleas of record duly filed in the said suits, and that the order of this court for writ of inquiry, and the proceedings thereon, be vacated and set aside.

The CHIEF JUSTICE delivered the opinion of the court.

The material question is, whether the defendant is entitled to plead anew, or is limited to an amendment of the plea originally filed. Upon the solution of this question may depend, at least to some extent, the regularity and validity of the order of this court. I shall consider the defendant's claim to this indulgence, and the power of this court to grant it, independent of the rule itself, and of all the extraneous circumstances which, upon the argument, were relied upon as affecting the rights of the parties.

Upon general principles, wherever a demurrer is filed in good faith or for the purpose of settling a question of law involved in the controversy, justice requires that, upon the decision of that point of law, either party should be permitted to amend his pleadings, in such mode as to present for determination the substantial cause of action, or the real ground of defense. The object of pleading is not to defeat, but to advance the ends of justice; not to destroy, but to protect the substantial rights of parties. In accordance with this clear and obvious principle, courts of justice

have manifested great and increasing liberality in allowing amendments after demurrer. By the ancient practice, indeed, no amendment was permitted after demurrer without consent, upon the principle, that where a party had staked his rights upon a point of law, he was bound to abide by his election. In delivering the opinion of the court in *Bramah v. Roberts* (1 Bing. N. C. 481), TINDAL, C. J., said, "The law of Westminster Hall, I believe ever since it stood in the place in which it now stands, has been, that if a party thinks proper to rest his defense or his case upon a point of law raised upon the record, he must either stand or fall upon the point raised." And when the strictness of the ancient rule began to relax, it was gradually and with reluctant steps. It was *at first* required that the amendment should be made only while the pleadings were in paper, before the argument of the demurrer, *next* before the opinion of the court had been pronounced, and *at length*, before the judgment had been rendered. In modern practice, however, it is well settled, in accordance with sound principle, that amendments may be made even after judgment upon demurrer, whenever the substantial ends of justice require it. Such is the law of this court. The subject was fully and ably investigated by Chief Justice HORN-BLOWER on more than one occasion, and settled by the unanimous judgment of the court.

Leave to amend, it is true, is not a matter of right, but rests in the sound discretion of the court. Where, however, the demurrer appears to have been filed in good faith, and there has been no verdict upon an issue of fact, leave to amend is granted very much as a matter of course, wherever it is material to the cause of action or to a substantial defense.

In the present case the defendant justified under authority of a statute, which in its terms, at least, was a clear authority for the commission of the alleged trespass. The plea was filed in good faith. It was held by this court a valid bar to the action. There has been no affection of delay on the part of the defendant; on the contrary, very unusual concessions have been made on his part to expedite the cause. Under these circumstances had the demurrer been sustained, and the plea adjudged insufficient by this court, the court by its well-settled and uniform course of practice would have permitted the defendant to plead

anew, either by amending the plea demurred to, or by adding such new pleas as might be deemed material to the defense.

* * * * *

But have the court the power, in the present position of the case, to order an amendment? The single issue between the parties was upon a general demurrer to the defendant's plea in bar. This court overruled the demurrer, and gave judgment for the defendant; upon writ of error that judgment was reversed, and the record remitted. The power of this court now to permit an amendment depends upon the character of the judgment rendered in the court above.

Upon a demurrer to a plea in law, or to any other pleading in chief, the judgment is *final*; final, I mean, not as contradistinguished from a judgment *interlocutory*, but final, as it is conclusive of the question at issue. And in this sense the judgment is equally final, whether it be for the plaintiff or for the defendant, or for or against the demurrant. Its conclusive effect cannot be avoided, except by opening or avoiding the judgment. The principle is thus clearly stated by Judge GOULD: "When the demurrer is joined on any of the pleadings in chief, as on the declaration, plea in bar, or other pleading which goes to the action, the judgment is final, i. e., if for the plaintiff, it is *quod recuperat*, if for the defendant, it is *quod eat sine die*. So that on demurrer to any of the pleadings which go to the action, the judgment for either party is the same as it would have been on an issue *in fact* joined upon the same pleading, and found in favor of the same party. Gould's Pl. 477, § 42. See, also, *Ferrers v. Arden*, Cro. Eliz. 668; S. C. 6, Coke, 7; *Hitchin v. Campbell*, 2 Wm. Bl. R. 831; Bac. Ab., Pleas & Pleadings, 1, 13; 2 Arch. Prec. 298-9.

And upon error brought from a judgment upon demurrer, regularly the judgment is in like manner final and conclusive. If error be brought by the plaintiff below, and the judgment be affirmed, it is simply a judgment of affirmance. If it be reversed, the court of error shall give such judgment as the court below ought to have given. The regular judgment of the court of errors in such case would be, that the judgment below be reversed; that the plaintiff recover his debt or damages, and that the record be remitted, to be proceeded in according to law. If the action were debt, the judgment would be technically a final judg-

ment, not interlocutory; and no remittitur would be necessary, except for the purpose of having execution. But the judgment of the court of errors upon a demurrer, in an action sounding in damages, though interlocutory merely, is equally as conclusive upon this court and upon the rights of the parties as if the action were debt, the judgment final, and no writ of inquiry needed.

It is true that courts may and do permit pleadings to be amended after judgment upon demurrer. But this end is attained either by not permitting the rule for judgment to be entered, or if entered, by vacating it, or by treating the pleading and the judgment upon it as a nullity, and in theory at least, if not in fact, striking it from the record. The court may thus deal with its own judgment, but by what authority shall it thus deal with the judgment of another tribunal? I am aware that in *The Utica Ins. Co. v. Scott*, 6 Cowen, 606, the Supreme Court of the state of New York held that an amendment might be made upon a remittitur after judgment in error upon a demurrer. With due submission to that learned tribunal, I am unable to assent to the conclusion of the court, or to the reasons upon which it is founded. The court of errors in that case had not only reversed the judgment below, but had rendered judgment for the plaintiff upon the demurrer (8 Cowen, 727). It must be admitted, therefore, that the case is an authority directly in point in support of the broad position, that this court may amend, even after judgment on demurrer in the court above. But, so far as I am aware, the authority is a solitary one. "It will be seen (say the court), by consulting the authorities, that courts have of late not confined themselves to cases where proceedings may be said to be in paper, but they have been guided by the question, whether substantial justice requires the amendment, *at whatever stage of the proceedings it may be moved.*" The last proposition is certainly too broad. It admits, at least, of some qualifications, one of which, I apprehend, is the very case under consideration. It can only be predicated with truth of proceedings before the same court while they remain *sub potestate legis*. The authorities, at least so far as I have been able to consult them, do not show that an inferior tribunal has the power to vacate or avoid the judgment of a superior tribunal, in order to let in an amendment of pleadings.

* * * Upon a reversal of judgment upon demurrer, the court of errors may at their discretion, permit the pleadings to be amended, or they may remit the proceedings to be amended at the discretion of the court below. Of the power of the court of errors to permit such amendments after reversal upon error, there can be no doubt. The judgment below being reversed, there can be no objection in point of principle to the amendment, and there are authorities to support the practice. *Hall v. Snowhill*, 2 Green, 21; *Pease v. Morgan*, 7 John. R. 468; *Stokes v. Campbell*, 5 Cowen, 21.

* * * * *

What, then, was the judgment of the court of errors? By the remittitur, it appears that the entry of the judgment in the minutes is as follows: "It is ordered and adjudged, that the said plea of the said defendant, in manner and form aforesaid by him above pleaded, and the matters therein contained, are not sufficient in law to bar or preclude the said plaintiffs from having or maintaining their aforesaid action against him, the said defendant; and it is further ordered and adjudged, that the record and proceedings therein be remitted to the said Supreme Court, to the end that the said Supreme Court may proceed therein according to law." * * * The court of errors, as we have seen, may, after reversal, either have rendered judgment upon the demurrer in favor of the plaintiff, thereby barring all amendments, or they may have simply remitted the record to this court, designedly leaving the judgment open, to permit this court to order an amendment or not, at their discretion. In the absence of any information to be derived from the entry, I cannot pronounce the omission a clerical error; but am bound to conclude that no final judgment was pronounced, or designed to be pronounced, by the court above, but that the matter was left open for the further action of this court. This view of the case is supported by the fact, that it is in accordance with a very usual, if not general practice of the court of errors of this state. It is strongly corroborated, moreover, by the fact, that the counsel of the plaintiff in error, upon the return of the remittitur, ruled the attorney of the defendant to amend his plea, which would not have been done if the court above had rendered judgment for the plaintiff.

* * * * *

I am, therefore, of opinion that the defendant is entitled to leave to plead anew, and that the pleas already filed do stand as the pleas in this cause, without prejudice to any question that may be raised touching their validity. The motion is granted upon the payment by the defendant of the plaintiff's costs upon the demurrer in this court, and also in the court of errors. I am further of opinion that the rule entered in the minutes of this court, at the term of October, 1848, for a writ of inquiry, was improvidently entered, and must, together with the writ of inquiry, and all proceedings thereon, be vacated and set aside, with costs. Let rules be entered accordingly.⁶⁰

* * * * *

60. *The rule is the same whether the demurrer be general or special.* This was decided in *State of Maine v. Peck* (1872) 60 Me. 498, where the court said: "Every special demurrer includes a general one, for under the former 'the party may, on the argument, not only take advantage of the faults which his demurrer specifies, but, also, of all such objections in substance, as regarding the very right of the cause, as the law does not require to be particularly set down.' Stephan on Pl. 141, 142; Bouvier's Law Dict., 'Demurrer.' In one just as much as in the other the party has his option to plead or demur, and must be equally bound by his election. * * * A special demurrer raises a question of law just as much as a general one, and there is no exception to the rule as laid down, that where there is an issue of law upon a plea 'which goes to the action' the judgment will be final."

TROW v. MESSER.

Supreme Judicial Court of New Hampshire. 1855.

32 New Hampshire, 361.

The action was *assumpsit*, brought by Messer to recover of Trow the sum of \$18; being one half the expense of dividing and building a partition fence between the parties in Springfield, in the county of Sullivan. The defendant filed a plea in abatement to the jurisdiction of the court, alleging in substance that the cause of action accrued in Sullivan county; that less than \$13.33 was due, if anything, and therefore the case was within the jurisdiction of a justice of the peace in that county, and not within the jurisdiction of the common pleas for this county. The defendant was described in the writ as of Sunapee, and the

plaintiff of New-London. The plaintiff demurred specially for causes assigned, and prayed judgment that the defendant might answer further. The court sustained the demurrer, and thereupon judgment was rendered for the plaintiff for \$18 debt, and \$10.83 costs, upon which execution issued, which has been collected of the defendant.

The error assigned was, that judgment had been rendered for the plaintiff for debt and costs, whereas by the law of the land it ought to have been that the defendant answer further.

Burke, for the plaintiff in error.

In the original action the judgment should have been *respondeat ouster*, instead of being that the plaintiff recover his damages and costs. The authorities relied upon are *Whitford v. Flanders*, 14 N. H. 371; *Barker v. Forest*, 1 Strange, 532; *Bowen v. Shapcott*, 1 East, 542.

* * * * *

FOWLER, J.: The authorities are clear, distinct and uniform, that the judgment for the plaintiff, in an issue of law, upon a demurrer to a plea in abatement, must be that the defendant answer over, and not that the plaintiff recover damages and costs. The reason is, because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the court. *Howe's Practice*, 215; 2 *Saunders*, 210, g. n. 3; *Eichorn v. LeMaitre*, 2 Wils. 367 *Onslow v. Smith*, 2 B. & P. 388.

* * * * *

Judgment reversed.

CUSHMAN v. SAVAGE.

Supreme Court of Illinois. 1858.

20 Illinois, 330.

BREESE, J.: In this case there was a plea in abatement of the jurisdiction of the court, the plaintiff residing in La Salle, and the defendant in the county of Cass. To the plea the plaintiff demurred, and it was overruled, and the court granted plaintiff leave to reply.

This was erroneous. After a demurrer to a plea in abatement has been overruled, it is not regular for the court

to grant leave to reply; for a judgment for the defendant, on such a plea, whether it be on an issue of fact or of law, is, that the writ be quashed. Tidd's Practice, 642; 1 Ch. Pl. 501; *Motherell v. Beavers*, 2 Gilm. 69; *McKinney v. Pennoyer et al.*, 1 Scam. 319; *Eddy et al. v. Brady*, 16 Ill. 396.

The case will be remanded to the circuit court of La Salle, with instructions to abate the writ.

Judgment reversed.

TYLER v. HAND.

Supreme Court of the United States. 1849.

7 Howard, 572.

Mr. Justice WAYNE delivered the opinion of the court.

This suit was brought upon ten bonds payable to Martin Van Buren, President of the United States, and his successors in office, for the use of orphan children provided for in the nineteenth article of the treaty with the Choctaw Indians of September, 1830.

The principal and interest due upon the bonds are demanded, and the plaintiff in the action, John Tyler, sues as successor of Martin Van Buren and trustee for the orphan children.

The defendants have demurred to the plaintiff's declaration, pursuing the usual form of a general demurrer, and have added thereto several special causes of demurrer. There is a joinder in demurrer. Upon these pleadings, the court below sustained the demurrer of the defendants. It is that judgment which is now before this court by the writ of error.

In our opinion, there is error in the judgment. We shall reverse it, with an order to the court below to enter up a final judgment for the plaintiff.

* * * * *

Having disposed of the fourth and fifth special causes of demurrer, we will now inquire, in their order, whether or

not the judgment which was given can be sustained upon either of the other alleged grounds.

The first is, "That there is no sufficient averment in the proceedings showing the citizenship or place of abode of the plaintiff, or that he is, by reason of the nature of his place of abode and citizenship, entitled by law to maintain this suit." This cannot justify the judgment, because it is demurring in abatement. In such a case the plaintiff is entitled to final judgment. If the matter of abatement be extrinsic, the defendant must plead it. If intrinsic, the court will act upon it upon motion, or notice it of themselves. (*Dockminique v. Davenant*, Salk. 220). But it does not follow, because a demurrer in abatement cannot be available for the defendant, that it is to be rejected altogether from the pleading, if tendered in proper time. It will be received, but being erroneously put in, it entitled the plaintiff to final judgment, so that for this reason the judgment of the court below would have to be reversed.

Perhaps the best exposition of this point of pleading anywhere to be found is that given in *Furniss et al. v. Ellis and Allen*, in 2 Brock. 17, by Chief Justice MARSHALL. He says, "The cases quoted to show the demurrer is not good, do not show that even in England it ought not to be received, if tendered in proper time. In 5 Bac. Abr. 459, it is said if a defendant demur in abatement, the court will, notwithstanding, give a final judgment, because there cannot be a demurrer in abatement. This does not prove that the demurrer shall be rejected, but that it shall be received, and that the judgment upon it shall be final. A judgment on a plea in abatement, or on a demurrer to a plea in abatement, is not final, but on a demurrer which contains matter in abatement it shall be final, because a demurrer cannot partake of the character of a plea in abatement. Salk., 220, is quoted by Bacon, and is to the same purport, indeed in the same words. These cases show that a demurrer, being in its own nature a plea to the action and being even in form a plea to the action, shall not be considered as a plea in abatement though the special cause alleged for demurring be matter of abatement. This court will disregard these special causes, and, considering the demurrer independently of them, will decide upon it as if they had not been inserted in it." And then the Chief Justice adds, in respect to the particular case then in hand, that

“these cases go far to show that the court would overrule the demurrer, and decide the cause against the party demurring, not that it should be expunged from the pleadings.”

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SECTION 2. GENERAL AND SPECIAL DEMURRERS.

ANONYMOUS.

Court of Kings Bench. 1704.

3 Salkeld, 122.

Per HOLT, C. J.: There were *special demurrers at common law*, but they were never necessary but in cases of *duplicity*, and therefore they were seldom practiced; for as the law was then taken to be upon a *special demurrer*, the party could take advantage of no other defect in the pleading, but to that which was specially assigned for cause of his demurring.

2. But upon a *general demurrer* he might take advantage of all manner of defects, that of *duplicity* only excepted; and there was no inconvenience in such practice, for the pleadings being at bar *viva voce*, and the exceptions taken *ore tenus*, the causes of demurrer were as well known upon a general demurrer as upon a special one; therefore after the Reformation, when the practice of pleading at bar altered, the use of general demurrers still continued, and thereby this public inconvenience followed, that the parties went on to argue a general demurrer not knowing what they were to argue, and this was the occasion of making the statute 27 Eliz., by which it is enacted, that the causes of demurrer should be known in all cases, and this was restorative of the common law.

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OHIO AND MISSISSIPPI RAILWAY COMPANY v.
THE PEOPLE *ex rel.*

Supreme Court of Illinois. 1894.

149 Illinois, 663.

This was an action of debt, brought in the name of the People, for the use of Wallace Van Gilder, against the Ohio and Mississippi Railway Company, to recover a penalty for an alleged violation of section 68, chapter 114, of the statute, which provides that "every railroad corporation shall cause a bell of at least thirty pounds weight, and a steam whistle, [to be] placed and kept on each locomotive engine, and shall cause the same to be rung or whistled by the engineer or fireman at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and shall keep ringing or whistling until such highway is reached."

* * * * *

Mr. Justice CRAIG delivered the opinion of the court.

It will be observed that the demurrer in this case was special, and while the declaration may be good in substance, yet, under the rules of pleading, if it was technically defective the judgment overruling the demurrer was erroneous. Here it is averred that the defendant, on a certain day, propelled a certain engine, with a certain train of cars attached thereto, across said public highway. What time in the day this occurred, in what direction the train was running, or whether it was a freight or passenger train, is not disclosed by the declaration. Suppose twenty or thirty trains cross this highway in different directions every day; how could the defendant know, from the averments of the declaration, which one of the trains plaintiff would attempt to prove had violated the law? And if it could not ascertain this fact from the averments of the declaration, how could the company be prepared with evidence to meet the charge made in the declaration? Chitty on Pleading (vol. 1, page 232) says: "A general statement of facts which admits of almost any proof to sustain it, is objectionable. * * * The principal rule as to the mode of stating the facts is, that they must be set forth with cer-

tainty, by which terms is signified a clear and distinct statement of the facts which constitute the cause of action or ground of defense, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment." In *Cook v. Scott*, 1 Gilm. 333, this court held: "The province of the declaration is to exhibit upon the record the grounds of the plaintiff's cause of action, as well for the purpose of notifying the defendant of the precise character of those grounds as of regulating his own proofs." The averments in plaintiff's declaration did not conform to the rule indicated. The plaintiff knew when this action was instituted what kind of a train had violated the statute, the direction it was running, and about the hour it crossed the highway, and it is imposing no hardship whatever upon a plaintiff to require those facts to be averred in the declaration, so that the defendant may come prepared to meet them.

* * * * *

We think the declaration was defective, and the court erred in overruling the demurrer. The judgments of the appellate and circuit courts will be reversed, and the cause remanded.

Judgment reversed.

SPENCER v. SOUTHWICK.

Supreme Court of New York. 1812.

9 Johnson, 314.

KENT, C. J. (*absente* SPENCER, J.) delivered the opinion of the court.

The *gist* of the libel consists in charging the plaintiff with hypocrisy, and a want of fidelity in this trust, as a senator, in effecting the incorporation of the Manhattan company, in which he was largely and profitably interested. The plea in justification of the charges states, that the plaintiff was a senator at the time of the passage of the bill, and that he advocated and supported it, and was, at the time, largely interested in its stock, and on which he made a great

profit; that he knew that the bill contained a clause giving power to institute a bank, and that only a very small portion of the legislature, not exceeding ten in number, knew of that fact, and that the plaintiff had good reasons to believe that he well knew that a large majority of both houses were totally ignorant of the fact, and that he did not disclose and make it known to the senate. To this plea the plaintiff put in a general demurrer, and the question is whether the facts in the pleas are not sufficiently averred, and whether they do not amount to an answer to the whole charge contained in the declaration. We cannot perceive any charge in the libel to which the plea is not a substantial answer, provided the plaintiff's knowledge that the legislature was ignorant of a banking power lurking in the bill be sufficiently averred.

That knowledge is averred only by way of argument and inference, and not directly, and the plea would, therefore, have been bad on special demurrer. A plea should be a statement of facts, and not of argument. But an argumentative plea is good on general demurrer. (Com. Dig. Tit. Pleader, E. 3. Bac. Abr. tit. Pleading, 1, 5 *in notis*.) The plaintiff's knowledge, in this case, is argumentatively stated. Certainly to a common intent is sufficient in a special plea; and certainly even to a certain intent, according to Mr. Justice BULLER, means that which, upon a fair and reasonable construction, may be called certain, without recurring to *possible* facts; for when words are used which will bear a natural sense, and also an artificial one, or one to be made out by argument, or inference, the natural sense shall prevail. (BULLER, J., in *King v. Lyme*, Doug. 159, and *Dovaston v. Payne*, 2 H. Bl. 530.) It is possible that the plaintiff might have had good reasons to believe, and yet not have believed; and that he might have had good reasons to believe that he well knew, and not have well known, or even imperfectly known, the truth before him. The force of any impression to be made upon the mind, from the operation of good reasons to be presented to it, will undoubtedly depend, in some degree, upon the character and discipline of that mind, and the existence of passions and biases which may impede or facilitate the progress of truth. But I cannot conceive that any person of a sound and intelligent understanding can have *good reasons to believe that he well knows a fact*, and yet not feel and act under

the influence of that impression. To a common intent, and upon a reasonable construction, that averment charges the plaintiff with knowledge of the fact, not, indeed, directly, but argumentatively. When a man has good reasons to believe that he well knows a fact, it amounts to *notice* of the fact sufficient to charge him with a knowledge of it, and to hold him responsible, not only as a moral agent, but in law, for the consequences of such knowledge.

The court are, accordingly, of opinion, that the defendant is entitled to judgment, with leave, nevertheless, to the plaintiff to withdraw his demurrer and reply, on the usual terms.

Judgment for the defendant.

SMITH v. LATOUR.

Supreme Court of Pennsylvania. 1852.

18 Pennsylvania State, 243.

LEWIS, J.: Where the facts set forth in a declaration or plea do not, *in any form in which they may be stated*, constitute a good cause of action in the one case, or a valid defense in the other, the parties may, if they prefer that course, contest the facts in the first place before the jury, and afterwards call for the judgment of the court upon them as found and set forth upon the record. But if the objections touch not the *substance*, but go merely to the *form* in which the facts are set forth, this course cannot be pursued. He that stands upon matters of form has a slippery footing; and if he slips at the time when the law requires him to stand, the objection is cured by his own inattention to the very matter which he charges upon his adversary. It is assuredly very late in the day to announce, in a decision of the highest court in the state, that duplicity in a declaration, and defects of form in setting forth a good cause of action, cannot be taken advantage of after verdict. The first is cause for *special* demurrer only, 1 *Tidd*, 647, and the last is cured by the verdict, 2 *Tidd*, 826. The second count, it is true, is informal. But we can readily perceive therein the elements from which a formal declaration

containing a good cause of action might have been construed. The defendants below are therein charged with fraudulently obtaining goods from the plaintiff below by pretending and *asserting* that they would pay the *value*, in a note against McMillan, which, it is in effect averred they knew to be worthless. After verdict, we may understand this declaration as containing the averments that the defendants represented the note of McMillan to be good and valuable; that they knew at the time that this representation was false; that they intended, by means of this falsehood, to defraud the plaintiff; and that they thereby succeeded in fraudulently obtaining his goods. These facts, properly set forth, constitute a good cause of action.

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MASSACHUSETTS MUTUAL LIFE INSURANCE
COMPANY v. KELLOGG.

Supreme Court of Illinois. 1876.

82 Illinois, 614.

Mr. Justice DICKEY delivered the opinion of the court.

This is an action of *assumpsit*, by Walter B. Kellogg, upon a life insurance policy issued to Henry H. Kellogg on July 27, 1868, insuring the life of Henry for the term of 23 years (beginning at noon of the day of the date of the policy), in the amount of \$1000, payable 90 days after proof and notice that he had attained the age of 45 years, or died prior to attaining that age; the sum insured in the latter contingency being for the benefit of Walter, the father of the assured. The policy is set out *in haec verba* in the bill of exceptions.

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Judgment by default was entered at the return term.

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After this, and before the assessment of damages, the defendant, by attorney, appeared and moved to set aside the default. The motion was overruled, and, on the as-

assessment of damages, the policy of insurance, only, was given in evidence, and to this defendant objected, and excepted to the ruling of the court in receiving the same in evidence. The court assessed the damages at \$1,009. Defendant then moved in arrest of judgment. This motion was overruled and final judgment entered for damages and costs, and defendant appealed to this court.

* * * * *

Appellant contends that the declaration is defective for want of an averment of an unconditional promise to pay money. In declarations in *assumpsit*, where the instrument sued upon does not contain an unconditional promise to pay money, the pleader, usually, after stating the conditional undertaking, the happening of the condition, proceeds to say that defendant thereby became liable to pay, and thereupon "undertook and promised," etc., but this is a mere matter of form, and the failure to do so cannot be questioned upon general demurrer or motion in arrest, or on error. It is sufficient, except on special demurrer, that the pleader has stated distinctly that which, if proven, will sustain the action. This is done in this case. The making of the policy, the conditions of contract, the performance of all conditions he is bound to show were performed, and the happening of the contingencies upon which defendant becomes liable to pay, and the failure of defendant to so pay, are all set out in this declaration.

We cannot commend this declaration as a model of artistic pleading, but its imperfections are not such as to require a reversal of this judgment. * * *

ROACH v. SCOGIN.

Supreme Court of Arkansas. 1840.

2 Arkansas, 128.

DICKINSON, J., delivered the opinion of the court.

The only question presented for the consideration of this court is as to the correctness of the decision of the court below in sustaining the demurrer.

The defendant in this instance has wholly disregarded the 60th section of the Rev. Ark. Stat., p. 627, under the head of Practice at Law, which requires that when any demurrer shall be filed in any action, and issue joined thereon, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear, without regarding any defect or other imperfection in the process or pleading, so that sufficient appear in the pleadings to enable the court to give judgment according to the very right of the cause, unless such defect or imperfection be specially expressed in the demurrer;⁶¹ therefore, upon the principles decided at the present term of this court, in the case of *Davis v. Gibson*, 2 Ark. 115, we must consider it a general demurrer, and the only question presented for our decision is, whether the plaintiff has stated and set forth a sufficient cause of action to be legally entitled to a recovery. The declaration contains two counts, and each one is founded on a promissory note executed on the first day of February, 1839, to the plaintiff, by which the defendant acknowledges himself to owe said plaintiff the sum of three hundred and thirty dollars and eighty-four cents in good cash notes, and alleging that the same remain due and wholly unpaid by the defendant. These facts are sufficient in law to entitle the plaintiff to a recovery and are pleaded in the declaration with sufficient certainty; while the defendant has omitted to state in his demurrer in what respect the declaration is defective or imperfect, and unless such defect or imperfection is so stated and set forth, this court is not authorized to regard it.

Wherefore, the opinion of this court is, that the judgment of the court below in sustaining the demurrer to the

61. This is a substantial re-enactment of the statute 27 Eliz. Cap. V, § 1, which provided "That from henceforth, after demurrer joined and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right and cause of the matter in law shall appear to them, without regarding any imperfection, defect or want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express together with his demurrer; and that no judgment to be given shall be reversed by any writ of error, for any such imperfection, defect or want of form as is aforesaid, except such only as is before excepted."

This statute of 27th Elizabeth was given so technical a construction, in the matter of what should be deemed substance and what form (see *Heard v. Baskerville*, Hob. 232) that another statute, 4 Ann. Cap. XVI, § 1, was enacted wherein it was provided that a number of defects, previously held to be matters of substance, should thenceforth be deemed matters of form only.

plaintiff's declaration is erroneous, and that the same ought to be reversed with costs, and this case be remanded to the Hempsted Circuit Court for further proceedings to be had therein, not inconsistent with this opinion.

BRADBURY v. TARBOX.

Supreme Judicial Court of Maine. 1901.

95 Maine, 519.

EMERY, J.: This action was begun December 14, 1900. While it was pending the defendant obtained a certificate of discharge from his debts from a state court of insolvency, January 14, 1901. * * * The defendant filed a special plea in bar after withdrawing all other pleas by consent. This special plea, therefore, is the only plea filed and its sufficiency is challenged by a demurrer.

By electing to make his defense in this manner the defendant subjected himself to the rules governing special pleas in bar and was bound to make his special plea conform to those rules. They apply with as much strictness to a special plea of a discharge in insolvency as to any other special plea. *Frary v. Dakin*, 7 Johns. 75; *Frost v. Tibbetts*, 30 Maine, 188. The plea must state facts and not mere conclusions of law. It must show affirmatively, by allegations of fact within itself, that the discharge is valid, that it is granted by a court having jurisdiction and upon due proceedings, and that it bars the debt sued for. All these allegations must be issuable, that is, such as would present an issue of fact for a jury if traversed.

Tried by this rule this plea seems faulty in one respect at least. The discharge does not bar the debt sued for if the latter was a debt created by the fraud or embezzlement of the insolvent, or was for necessities furnished to the debtor, or his family, within thirty days of the commencement of proceedings. The plea should have distinctly alleged that the debt sued for was not created by either circumstance. *Frost v. Tibbetts*, 30 Maine, 188. As to this, the only allegation in the plea is that the debt sued for "is not a debt which is by said chapter 70, R. S., excepted from

the operation of the defendant's discharge in insolvency." This is a statement of a conclusion of law, not an allegation of fact. A traverse of that statement would not present an issue of fact for the jury. What debts the statute exempts from the discharge is a question of law. Whether a debt was created by fraud, or was for necessities, is a question of fact, but it must be alleged and traversed as a question of fact before it can be tried by a jury.

In *Frost v. Tibbetts*, *supra*, 30 Maine, 188, the plea described the plaintiff's claim and averred that it was barred by the discharge. On a general demurrer to the plea the defendant argued that this allegation negatived the debt being one of the excepted classes. The court, however, adjudged it to be insufficient for that purpose. The language used in this plea is no more than a paraphrase of that in *Frost v. Tibbetts*. It means no more than that the discharge barred the debt—a mere conclusion of law.

As held in *Frost v. Tibbetts*, the general demurrer reaches this fault, it being a lack of necessary allegation. Though the plaintiff is said to have "demurred specially," his demurrer was general as well as special and is available as such. Chitty's Pl. (16th Am. Ed.) 696; *Burnet v. Bisco*, 4 Johns. 235. The fault may seem very technical, but it is a fault under the rules, and as it has been exposed by demurrer it must be corrected. This the defendant can do upon the payment of costs from the time the demurrer was filed.

Exceptions sustained. Demurrer sustained.

BROWN v. JONES.

Court of Appeals of Maryland. 1839.

10 Gill and Johnson, 334.

[This was an action of debt, brought by Jones, as administrator of Peter Earther, deceased, upon a writing obligatory wherein defendant's intestate acknowledged himself indebted to the said Peter Earther in the sum of one hundred pounds current and lawful money of Pennsylvania. The defendant filed a special demurrer to the declaration,

on the sole ground that the plaintiff had not made sufficient proof of his letters of administration. The court overruled the demurrer. Appellant argued that this demurrer should have been sustained not only upon the ground specified therein but also upon two other grounds, not specified. The court of appeals held that the demurrer was not well taken on the ground specified, and then proceeded to discuss one of the grounds not specified, as follows:]⁶²

STEPHEN, J.: We think that the third objection is fatal to the plaintiff's right of recovery. Upon that point (the second point of the appellant in his statement), upon the authorities adduced, there seems to be no ground to doubt. It was essentially necessary to aver in the declaration, the value of the *Pennsylvania* money, for which the suit was brought. Our courts cannot take notice judicially of the value of foreign coin; and therefore, where such a suit is brought for a foreign currency, the value ought to be averred in the declaration, or the defect will be fatal on general demurrer, the office of which the special demurrer performed in this case, as well as that for which it was designed by the pleader. This principle of pleading, and the necessity for such an averment, were fully sustained by the authorities referred to in the course of the argument. We, therefore, think that the judgment of the court below was erroneous, and ought to be reversed.

Judgment reversed and procedendo awarded.

62. Condensed statement of facts by the editor.

HUMPHREY v. WHITTEN.

Supreme Court of Alabama. 1849.

17 Alabama, 30.

Trover by the defendant against the plaintiff in error for the conversion of a horse. The defendant was declared against by the name of James Humphreys and filed as a plea "that he now is and always was called and known by the name of James Humphrey, and not James Humphreys, as by the plaintiff's writ is supposed: wherefore he prays judgment of said writ that the same be quashed." To this

plea, which was sworn to by the defendant, the plaintiff demurred, and the court sustained the demurrer. The ruling of the court is now assigned as error.

* * * * *

PARSONS, J.: In spelling and in sound there is a perceptible difference between the names of Humphreys and Humphrey. They are different names. The plea in this respect is therefore good. But the plea concludes neither with a verification, nor to the country. It denies the surname, Humphreys, by which the defendant is sued, and avers his true surname to be Humphrey. This last is new matter, and, of course, the plea should have concluded with a verification, in order that the plaintiff might have an opportunity to answer it. 1 Saunders' R. 103, n. 1; *Service v. Heermance*, 1 Johns. R. 90. The plaintiff below filed a general demurrer to this plea, and it was sustained by the circuit court. It does not appear upon what ground it was sustained, but it is sufficient that there is a good ground, the omission of the verification. Our statutes relative to amendments and special demurrers have produced no change of the law in respect of this question, but it stands as at common law. Although there were special demurrers at common law, they were rarely used and never necessary except in cases of duplicity. The statute, 27 Eliz. c. 5, rendered it necessary to demur specially when the party desired advantage of any imperfection, defect or want of form, in any writ, plaint, etc. Then came the statute of 4 Ann. c. 16, par. 1, which rendered a special demurrer necessary in relation to various causes, which were still regarded as matters of substance. This statute, among other things, rendered it necessary to demur specially for want of the averment or verification in question. But these statutes did not extend to pleas in abatement. It was never necessary to demur specially to them. 1 Tidd's Practice, 695-6, ninth edition. By our statute of 1807, it became necessary here to demur specially for any defect or want of form in writs, declarations, or other pleading, etc. Clay's Dig. 321, par. 50. The want of the necessary verification in concluding a plea in bar, could only be taken advantage of since this statute, I presume, by a special demurrer. But the act of 1824 takes away all special demurrers. Clay's Dig. 334, par. 118. It says "no demurrer shall have any other effect than that of a general demurrer."

I presume there is no mode now of taking advantage of an error of this kind, in a plea in bar. But this is not the case here in relation to a plea in abatement, any more than in England, for it has been held by this court that our statutes do not extend to pleas in abatement, or, at least, that the last-mentioned act does not. *Casey v. Cleveland et al.*, 7 Porter, 445. We have no hesitation in concluding that pleas in abatement are not affected by these statutes and that they are left as at common law when a special demurrer was never necessary, unless in cases of duplicity. Let the judgment be *affirmed*.⁹³

63. *Form of demurrer to plea in abatement.* Same as in the form previously shown, except that in place of the words "not sufficient in law for the said A B to have and maintain his aforesaid action thereof against him the said C D," the following words are used, "not sufficient in law to quash the said writ." 2 Chitty on Pleading, 679.

SECTION 3. JOINT AND SEVERAL DEMURRERS.

BROWN v. DUCHESNE.

Circuit Court of the United States for the First Circuit.
1854.

2 Curtis, 97.

CURTIS, J.: This is an action on the case for the violation of a patent right. The defendant pleaded the general issue and two special pleas. The plaintiff demurred, commencing his demurrer as follows: "And the said plaintiff says that the several pleas by the said Duchesne, in manner and form aforesaid pleaded, and the matters therein contained, are insufficient to bar the plaintiff," etc., in the usual form of a demurrer. And he assigns several causes of demurrer specially. Without regard to the defects of form specially pointed out, if this demurrer is taken to all the pleas, and any one is found good, the demurrer must be overruled. There is certainly one good plea, for the general issue, in the usual form, is upon the record. And it is clear the demurrer covers all the pleas. It applies in terms to the several pleas, which means all the several pleas. There is a settled form of replying to one or more

pleas to the exclusion of others, which is "as to the said plea by the said defendant secondly, or secondly and thirdly above pleaded," etc. When not thus restricted, the legal intendment is, that all are included in the answer made to them.

*The demurrer must be overruled.*⁶⁴

64. This is the well-settled American rule: *Chamberlain v. Darrington* (1837) 4 Port. (Ala.) 515; *McKay v. Friebele* (1858) 6 Fla. 21; *Knapp Co. v. Ross* (1899) 181 Ill. 392; *Hay v. Collins* (1903) 118 Ga. 243; *Martin v. Williams* (1816) 13 Johns. (N. Y.) 264; *United States v. Girault* (1850) 11 How. (U. S.) 22; *Nat. Exchange Bank v. Abell* (1872) 63 Me. 346. The same rule is adhered to in states which have adopted the code system of pleading: *Jensen v. Dorr* (1911) 159 Cal. 742; *Sykes v. Kruse* (1911) 49 Colo. 560; *Jenkins v. Nat. Bank* (1911) 19 Ida. 290; *Frederick v. Koons* (1907) 40 Ind. App. 421; *Emmerson v. Botkin* (1910) 26 Okla. 218; *Peterson v. Lumber Co.* (1911) 62 Wash. 189.

SOUTHEASTERN RAILWAY COMPANY v. THE RAILWAY COMMISSIONERS.

Court of Appeal. 1881.

6 Law Reports, Queen's Bench Division, 586.

The defendants demurred to a declaration in prohibition, in which the plaintiffs, the South Eastern Railway Company, prayed a writ to prohibit the defendants, the Railway Commissioners, from further proceeding in any way in the matter of an application which had been made to the commissioners by the corporation of Hastings, under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and the Railways Regulation Act, 1873 (36 & 37 Vict. c. 48), for an order enjoining the plaintiffs, first, to enlarge the Hastings station, and to provide better booking office, waiting room, refreshment room, and general accommodation therein; secondly, to lengthen and deepen the existing platforms of the station, and to provide additional platforms; thirdly to provide better warehouse accommodation for goods at the station; fourthly, to provide cattle pens at the station, and additional sidings for cattle trucks; and, fifthly, to enlarge the platforms of the St. Leonards station and to provide the said station with a new approach by a direct route.

* * * * *

* * * The majority of the Queen's Bench Division (COCKBURN, C. J., and MANISTY, J., LUSH, J., dissenting), held that the Railway Commissioners had no jurisdiction to entertain the application and to make the orders proposed, and accordingly judgment on the demurrer was given for the plaintiffs in prohibition.

* * * * *

LORD SELBORNE, L. C.: The order of the Queen's Bench Division which is appealed from in this case, by overruling generally the demurrer of the Railway Commissioners to the declaration in prohibition of the South Eastern Railway Company, has affirmed the incompetency in point of law of the commissioners to order the company (upon an application by the corporation of Hastings) to execute certain improvements of, or connected with, their stations at Hastings and St. Leonards.

* * * * *

* * * I should have been prepared to allow the demurrer in part and to overrule it in part, if I had thought either that this conclusion was rendered technically necessary by the statements and prayer of the declaration in prohibition, or that upon the whole facts, appearing by the declaration and admitted by the demurrer, it was a course open to the court and practically convenient for the purposes of justice. But the declaration, according to its true construction, seems to me to challenge altogether the jurisdiction of the Railway Commissioners to take any cognizance of the complaint of the corporation of Hastings. It begins by saying that the commissioners "wrongfully assumed jurisdiction to hear and determine the application, notwithstanding the protest of the railway company that they had no jurisdiction to hear or determine the said application, or any part thereof," and, after stating *in extenso* the judgment pronounced by the commissioners on the 18th of May, 1878, and the application itself and the company's answer to it, it concludes by asking for a writ to prohibit the commissioners and every of them "from further proceeding in any way touching the premises aforesaid before them." I do not think that this form of declaration makes it technically necessary for the court, on a general demurrer by the defendants in prohibition, to do more than say that the commissioners either have or have not jurisdiction over the matter brought before them by the com-

plaint of the corporation of Hastings: If, on the face of the complaint, they had no jurisdiction over any part of that matter the demurrer must, of course, be overruled. If there were some matters in that complaint over which they had, and others over which they had not jurisdiction, the demurrer ought to be partly allowed and partly overruled. But if (which is my own view) they had jurisdiction over the whole matter of the complaint as summed up in the 7th and 14th paragraphs, then I think that they ought to be permitted to deal with that whole matter, by making some order upon it which (as yet) they have not done, and that it cannot be technically wrong upon such a record to allow the demurrer generally.

* * * * *

LORD COLERIDGE, C. J.: I agree in the judgment just delivered by the Lord Chancellor.

BRETT, L. J. * * *

* * * * *

* * * That where an inferior court acts within its jurisdiction as to part, but exceeds as to part, a prohibition, though moved for as to the whole, may issue as to the part in excess, seems to have been early decided: see Comyn's Digest Prohibition (F. 17), and *Lush v. Webb*, 1 Sid. 251; and Buller's *Nisi Prius*, p. 218, b. It seems to follow that, after declaration in prohibition and traverse, and trial, the judgment might be to prohibit as to part and to award a consultation or otherwise give judgment for the defendant in prohibition as to the rest. This being so, the question is raised as to what is the proper judgment on a demurrer to the whole of a declaration in prohibition. If the demurrer is to the whole declaration, and part of the declaration be good and part bad, should the judgment on demurrer be absolutely in favor of the plaintiff, or for the plaintiff as to the good and for the defendant as to the bad? There has been a difference of judicial opinion. The origin of the dispute is described with the usual learning of Mr. Sergeant Manning, in the note to *Hinde v. Gray*, 1 Man. & G. 201, and it is there suggested that the doctrine of overruling a demurrer as too large, and therefore giving judgment absolutely in favour of a pleading admitted to be good as to one separate part of it, but bad as to another separate part of it, was a novel doctrine, and was contrary to the older decisions. This note, written in 1840, changed

the opinion of PARKE, B., as expressed by him in 1838, in *Boydell v. Jones*, 4 M. & W. 451. For in 1842, in *Briscoe v. Hill*, 10 M. & W. 741, he said, "With respect to the subject of a demurrer being too large, there is a very learned note of my Brother Manning, which, in my opinion, is entitled to considerable weight." "The question is," he says, after describing the practice, "is that practice right or not, or ought not the court on such demurrer to give judgment on the whole record according to the truth? I think the observations in that note are entitled to considerable weight, and I am inclined to think the practice has been wrong, and that the judgment on demurrer should be given on the whole record, according to the truth." In 1845, in *Slade v. Hawley*, 13 M. & W. 761, he said: "There is an able note of my Brother Manning in the case of *Hinde v. Gray*, 1 M. & G. 201, which tends strongly to shew that the practice of overruling demurrers as being too large is incorrect, and that the court ought to give judgment on the whole record, according to the truth." And in *Dawson v. Wrench*, 3 Ex. 365, he said, "formerly if a demurrer was too large, the court gave judgment generally against the party demurring. That rule was imported from courts of equity but is incorrect with respect to courts of law, as pointed out by my Brother Manning in a note to the case of *Hinde v. Gray*, 1 M. & G. 201. The higher justice of this latter view of PARKE, B., seems obvious. The futility of the intermediate practice cannot be better exemplified than by the description of the result of it given by PARKE, B., in *Boydell v. Jones*, 4 M. & W. 451. The later view of PARKE, B., is shewn in the note by Sergeant Manning to be in accordance with the ancient decisions of the common law courts. I am of opinion that the later view of PARKE, B., is correct, and that upon a demurrer to the whole of a pleading which contains allegations capable of being separated, some of which allegations are correct and some incorrect, the judgment on the demurrer should be distributed, and should be in favour of the good and against the evil pleading. The judgment on the demurrer in the present case should therefore be against the demurrer as to all the different orders but two, and in favour of the demurrer as to entertaining the complaint as to two. * * *

* * * * *

MAY v. JONES.

*Supreme Court of Georgia. 1891.**88 Georgia, 308.*

LUMPKIN, J.: May brought his action of libel against Jones and the Merchants Bank of Atlanta, for damages to his credit and standing as a business man, by reason of a certain draft being protested for nonpayment by said Jones who was a notary public and also an employee and agent of the bank. The defendants joined in a demurrer to the declaration on the grounds that there was no cause of action set out as for a libel; that there was no cause of action set out as for a wrongful protest; and that the bank was not liable for the acts of Jones under the allegations in the declaration. The judgment on this demurrer recites that the plaintiff's attorney disclaimed in open court any claim for damages for a wrongful protest, but advised the court that the declaration was intended to be a claim for damages as for libel only. Whereupon the court sustained the demurrer and dismissed the case, because the declaration contained no legal cause of action. This is the error complained of.

* * * * *

No doubt as against Jones a cause of action is sufficiently set out. The declaration distinctly alleges that the charges in the protest were false, fraudulent, and malicious, and made in reference to the plaintiff's trade. * * *

* * * * *

2. But as against the Merchants Bank no cause of action is set out. The plaintiff's theory is that, as Jones, the notary public, was also an employee and agent of the bank, "the action of defendant Jones in the matter, he acting under the authority of defendant bank, is the action of said bank." This is all the allegation touching the bank's liability. Although there is conflict in the cases, the prevailing and better holding seems to be that a bank is not liable for the negligence or misconduct of a notary employed by it to protest negotiable paper. The reason is that the notary is not a mere agent or servant of the bank, but is a public officer sworn to discharge his duties properly.

He is under a higher control than that of a private principal. He owes duties to the public which must be the supreme law of his conduct. Consequently when he acts in his official capacity, the bank no longer has control over him and cannot direct how his duties shall be done. If he is guilty of misfeasance in the performance of an official act, the bank is not liable. * * *

* * * * *

4. The case stands thus. The declaration, which is good as to one defendant and bad as to the other, is jointly demurred to by both. What ought to have been the judgment on this demurrer? The general rule is, a pleading which is demurred to as a whole, if good in part, will stand, and the demurrer be overruled. *McLaren v. Steapp*, 1 Kelly, 376; *Hazlehurst v. Savannah R. R.*, 43 Ga. 13; *Finney v. Cadwallader*, 55 Ga. 75; *East Rome Town Co. v. Nagle*, 58 Ga. 474; *Lowe v. Burke*, 79 Ga. 164. While this rule applies chiefly to the contents or subject-matter of the pleading, it extends also to parties who unite in a demurrer. Where joint defendants unite in a general demurrer to the declaration, if a cause of action is set out as to either, the demurrer must be overruled. This applies to actions *ex contractu*. *Woodbury v. Sackrider*, 2 Abb. Pr. 402; *Phillips v. Hagadon*, 12 How. Pr. 17; *Estep v. Burke*, 19 Ind. 87; *Shore v. Taylor*, 46 Ind. 345; *Wilkerson v. Rust*, 57 Ind. 172; *Webster v. Tibbits*, 19 Wis. 461; *Willard v. Reas*, 26 Wis. 540; *McGonigal v. Colter*, 32 Wis. 614; *Walker v. Popper*, 2 Utah, 96. To complaint for land. *People, etc., v. Mayor, etc.*, 28 Barb. 240. 17 How. Pr. 56. To an action in tort. *Dunn v. Gibson*, 9 Neb. 513. There is some authority for a different rule in equity, namely that the demurrer may be sustained as to one defendant and overruled as to another. *Wooden v. Morris*, 2 H. W. Green (N. J.), 65; *Bartow v. Smith*, Walk. Ch. (Mich.) 394; 1 Dan. Ch. Pr. 584; Story's Eq. Pl., par. 445. These authorities rest upon the opinion of Lord ELDON in *Mayor, etc., v. Levy*, 8 Ves. 403, which does not decide the point, as he held the demurrer good as to all the defendants. Lord ELDON's view is followed in a well-written opinion in *Wood v. Olney*, 7 Nev. 109, which was an action on contract. Under the code system, the rule first stated is applied also to proceedings of an equitable nature. *Eldridge v. Bell*, 12 How. Pr. 547; *Teter v. Hinders*, 19 Ind. 93; *Morbach v. The State*,

34 Ind. 308; *Owen v. Cooper*, 46 Ind. 524; *Eichbrecht v. Angermann*, 80 Ind. 208; *Sanders v. Farrell*, 83 Ind. 28; *Pomerooy on Rem.*, par. 577. But there is no authority for sustaining such a demurrer as a whole. The court, it seems, will not, without an application for that purpose, amend or split up a joint demurrer so as to make the separate demurrer of each defendant, and then search the declaration in turn to find whether a cause of action is set out against each. But in order to prevail, the demurrer must be good as to all joining in it. The court need not of its own motion render two judgments upon it.

It follows that the court erred in sustaining the demurrer to the entire declaration, the same setting out a cause of action as to one defendant. * * * *Judgment reversed, with direction.*

SECTION 4. EFFECT OF DEMURRER IN OPENING THE RECORD.

ORDINARY v. BRACEY.

Constitutional Court of South Carolina. 1802.

1 Brevard Law, 191.

* * * * *

GRIMKE, J.: This appears to be a case where the plaintiff has put himself on the judgment of the court, there being no issue to the country, and wherein he prays the court to reverse the circuit decision, as to the propriety of the pleading; acknowledging that he had committed a fault, but insisting, that as defendant had been faulty before him, the court should have looked for the first fault; and if found in defendants, that the judgment should have been for the plaintiff. Upon this, two questions arise: 1. Whether the court will, on demurrer, look to the first fault, and give judgment accordingly. * * *

As to the first point I have no doubt that on demurrer the court will look through the whole proceedings, and wherever the first fault arises, there they will lay their finger, and give judgment against such of the parties as shall have committed it. 2 Wils. 150, is to this point; and

2 Str. 302; and Doug. 91; where BUTLER, J., said it was necessary to look beyond the plea, which was clearly bad. And the reason of this course of proceeding in the court is fundamentally right; for should they, in the first instance, rectify the last fault, they must then hear another motion to set the preceding one to rights also; by which mode half a dozen questions might be made on the propriety of proceedings, only one of which might be determined at any one court. This would be the means of lengthening out an issue to an unreasonable length of time, and to the very great delay of justice. Whereas by the rule laid down above, that the court will look for the first fault, and give judgment accordingly, all the subsequent defective proceedings are at once, and by one single decision, set at naught, and dismissed.

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RYAN v. MAY.

Supreme Court of Illinois. 1852.

14 Illinois, 49.

CANTON, J.: This action was brought upon a note payable to the bank, by Ryan, surviving assignee of the bank, in whom the legal title was vested by the assignment and several acts of the legislature. The defendant filed a plea in abatement, which states in substance, that Ryan was not the assignee of the bank, and had no legal interest in the note sued on, because he with others had, by a certain deed of indenture, conveyed and transferred the note to William Thomas. To this plea a replication was filed, averring that Ryan did not by indorsement on the note assign it to Thomas, so as to vest the legal title in him. To this replication a demurrer was filed, which was sustained by the circuit court, and judgment rendered for the defendant on the plea in abatement. The defense set up by the plea, was certainly not answered by the replication, and if the plea was good, the replication was undoubtedly bad. The plea states, that Ryan assigned the note to Thomas by a separate instrument. This statement is not denied by the rep-

lication, but that avers, that Ryan did not assign it by indorsement thereon. The plea in our opinion was insufficient. It did not show that the legal title to the note had passed out of Ryan. By our statutes the legal title to a note cannot be transferred by a separate instrument in writing. The statute says that the note, bond, bill, etc., "shall be assignable by indorsement thereon, under the hand or hands of such person or persons, and of his, her or their assignee or assignees in the same manner as bills of exchange are, so as absolutely to vest the property thereof in each and every assignee or assignees successively." This is the mode pointed out by the statute, and it must be pursued in order to vest a right of action in the assignee of a note. The plea, therefore, did not show that the legal title had passed from the plaintiff to Thomas. The demurrer should have been carried back to the plea.

But the defendant insists that the declaration was also bad, because the time had elapsed within which the assignees were required to wind up the affairs of the bank; and that hence the rights of the plaintiff, as assignee, had ceased. This question we are not at liberty now to investigate. It is a general rule, that a demurrer must be carried back and sustained to the first defective pleading. This rule does not apply, so as to carry a demurrer behind a plea in abatement. If the plea is bad, the judgment must be *respondeat ouster*. In stating the exceptions to the general rule, that a demurrer must be sustained to the first defective pleading, Mr. Stephen says: "First, if the plaintiff demur to a plea in abatement, and the court decide against the plea, they will give judgment of *respondeat ouster*, without regard to any defects in the declaration." Stephens' Plead. 144. This rule was applied in *Rich v. Pilkington*, Carthews, R. 171, and in *Hastrop v. Hastings*, 1 Salk. 212.

When we consider the peculiar character of a plea in abatement, the reason is obvious. Unlike other pleas, a plea in abatement does not profess to answer the declaration, or defeat the cause of action. It goes only to the writ. It would be inconsistent with all sound rules of pleading, to carry a demurrer to one pleading back to another, to which it did not profess to be an answer, and with which it had no connection. *Dean v. Boyd*, 9 Dana, 179; *Crawford v. Slade*, 9 Alabama, 887. The demurrer should have

been sustained to the plea in abatement, and a judgment rendered, that the defendant answer over.

The judgment of the circuit court must be reversed, and the cause remanded.

Judgment reversed.

LEE v. FOLLENSBY.

Supreme Court of Vermont. 1909.

83 Vermont, 35.

HASELTON, J.: • • •
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The defendants contend that the demurrers to the second and third pleas should have been overruled, whether such pleas be good or bad, on the ground that the plaintiff's declaration is bad for misjoinder of counts, and that a demurrer reaches back through the pleadings and fastens upon the first substantial defect.

Since the second and third pleas are held bad, this claim is for consideration; but the rule invoked only requires that the court should follow the pleadings back through their course, and since neither the second plea nor the third undertakes to answer the declaration as a whole, but since each such plea is directed to a specific count, the question of misjoinder of counts is not reached by going back through the record.

The principle is that a bad pleading is sufficient if that which it undertakes to answer is bad, and so if a plea undertakes to answer only a single count in a declaration, a demurrer to such plea cannot bring in question the sufficiency of the declaration as a whole. If, for instance, a defendant filed a demurrer to one count of a declaration and a plea to another count, and such plea is demurred to by the plaintiff, neither the defendant's demurrer nor the plaintiff's raises the question of misjoinder of counts.

In *Hooker v. Smith*, 19 Vt. 151, 47 Am. Dec. 679, the declaration was in three counts. To the defendant's second and third counts the plaintiff filed a replication which was demurred to. In argument on the demurrer reference was

made to a defect in the first count of the declaration, but the Supreme Court held that the sufficiency of that count was not brought in question by a demurrer to a plea which went to the second and third counts.

In *Black v. Howard*, 50 Vt. 27, the declaration was in several counts, and the plea, which went to the whole declaration, was demurred to. Since the plea went to the whole declaration the court considered the question of misjoinder of counts, and as to a claimed defect in the third count, held, that, if it existed, it was not reached. Judge BARRETT, who delivered the opinion, and the reporter, now the Chief Judge, carefully pointed out that the plea demurred to went simply to the declaration as a whole. In Gould's Pleading, Hamilton's Ed. 454, it is tersely said: "A demurrer, however, in opening a record, opens only that branch which it terminates."

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WILLIAMS v. MOORE.

Supreme Court of Alabama. 1858.

32 Alabama, 506.

[Williams, describing himself as administrator *de bonis non* of the estate of Peter Wyatt, deceased, sued Moore in detinue for personal property, declaring on his own individual title. The action was commenced in March, 1852. The defendant pleaded three pleas: 1st, *non detinet*; 2nd, the three-year statute of limitations; 3rd, the six-year statute of limitations; 4th, *ne unques administrator*. To the 2nd, 3rd and 4th pleas the plaintiff replied that Mary Wyatt and William Mock had been granted letters of administration on said estate in 1833, that they had sold the property, described in the declaration, to defendant without any order from the court, and that they were removed in March, 1852, and plaintiff was thereupon appointed administrator *de bonis non*. The court sustained a demurrer to this replication. The three-year statute of limitations applied to actions on open accounts; the six-year statute applied to

actions for the detention or conversion of personal property.]⁶⁵

WALKER, J.: (1-2) The replication of the plaintiff was clearly bad. It was no answer to the plea of the statute of limitations of six years, which was a good plea. The suit was by the plaintiff in his individual capacity. *George v. English*, 30 Ala. 582; *Agee v. Williams*, 30 Ala. 636; *Crimm v. Crawford*, 29 Ala. 623; *Rambo v. Wyatt's Adm'r*, 29 Ala. 510. The replication is framed upon the idea, that the action is by the plaintiff in his representative character, and signally fails to aver anything which would avoid the application of the statute of limitations to the plaintiff's individual suit. It follows, that if we look to the plaintiff's replication alone, we are bound to decide, that the court committed no error in sustaining the demurrer to it.

(3) Is the case changed by the fact, that the court did not visit the defendant's demurrer to the plaintiff's replication upon his own defective pleading? A. We think not. The replication is put in as an answer to three pleas, two of which were bad, and one good. A bad replication is good enough for a bad plea; and hence, though the issue of law is joined upon the bad replication, the judgment must be against the defendant upon the defective plea. Gould's Pleading, 474, par. 37. But we think a bad replication is not good enough for one good plea and two bad ones. If the court had looked back through the record for defects in the antecedent pleading, and visited its condemnation upon them as they were found, it would have given judgment against the defendant upon the two bad pleas, and would have been compelled at last to sustain the demurrer to the replication, because it was no answer to the remaining good plea. Thus it follows, that the sustaining of the demurrer to the replication, even though the court had done as the plaintiff contends it ought to have done, would have been inevitable, and the judgment would necessarily have been precisely as it was against the plaintiff upon his refusal to answer over after sustaining the demurrer to his replication. In any point of view, the result which the court attained was correct; and, therefore, the judgment is affirmed.

AUBURN AND OWASCO CANAL COMPANY v.
LEITCH

Supreme Court of New York. 1847.

4 Denio, 65.

Demurrer to a replication. The declaration was in *assumpsit* for the recovery of certain instalments due upon shares of the capital stock of the plaintiff corporation, subscribed for by the defendant. Pleas, 1. *Non assumpsit*. 2. *Nul tiel corporation*. Replication to the second plea, setting out the act incorporating the plaintiff, together with certain acts amending and continuing that act. The defendant demurred to the replication, and the plaintiff joined in demurrer.

By the court, BRONSON, C. J.: The defendant insists that the declaration is bad on general demurrer. [The chief justice then examined the pleadings, and came to the conclusion that the declaration was substantially defective; and then proceeded as follows:] But it is said, that as the defendant pleaded *non assumpsit* as well as *nul tiel corporation*, he cannot upon this demurrer go back, and attack the declaration; and several cases have been cited to sustain that position. But it will be found on examination that the point has never been directly and necessarily adjudged. The doctrine was first started in *Wheeler v. Curtis*, 11 Wend. 653, and was there supposed to result from the well-established rule, that the defendant cannot both plead and demur to the same count. It was said that the defendant should not be allowed to do indirectly, what he would have no right to do directly. But the question whether the declaration was good or bad was not decided. The cause went off upon other grounds; and the point in question was not necessarily settled. In *Dearborn v. Kent*, 14 Wend. 183, the *dictum* in the first case was repeated; but it was expressly held that the declaration was sufficient; so that it was wholly unnecessary to inquire whether the defendant was at liberty to make the question or not. *Russell v. Rogers*, 15 Wend. 351, is the next case; and there it was not decided whether the declaration was good or bad. It was apparently good; so that the point in question did

not necessarily arise. In *Miller v. Maxwell*, 16 Wend. 9, this doctrine was mentioned for the last time; and the same learned judge who first started it, went a great way towards knocking it on the head. In that case the defendant pleaded the general issue, and two special pleas. The plaintiff demurred to the special pleas, and they were adjudged bad; but the defendant was allowed to go back and attack the declaration; and judgment was given against the plaintiff for the insufficiency of that pleading. Now, although the learned judge who delivered the opinion of the court took a distinction between a defect in the declaration which would not be cured by a verdict, and one which could only be reached by a demurrer, the principle of that case is directly opposed to the *dicta* which had preceded it.

It is quite clear that the defendant cannot both plead and demur to the same count. And it is equally clear, that at the common law, he could not have two pleas to the same count. Indeed the two things, though stated in different words, are only parts of one common law rule, to wit, that the defendant cannot make two answers to the same pleading. The statute of 4 and 5 Anne, ch. 16, was made to remedy this inconvenience; and it allowed the defendant, with the leave of the court, to plead as many several matters as he should think necessary for his defense. With us, leave of the court is no longer necessary. (2 R. S. 352, par. 9.) The statute does not say that the defendant may both plead and demur; and consequently he cannot make two such answers. But he may plead two or more pleas; some of which may terminate in issues of fact, to be tried by a jury; while others may result in issues of law, to be determined by the court. And whenever we come to a demurrer, whether it be to the plea, replication, rejoinder, or still further onward, the rule is to give judgment against the party who committed the first fault in pleading, if the fault be such as would make the pleading bad on general demurrer. This rule has always prevailed. It was the rule prior to the statute of Anne; and to say that the defendant, because he pleads two pleas, one of which results in a demurrer, cannot go back and attack the declaration, would be to deprive him of a portion of the privilege which the legislature intended to confer. He cannot plead and demur at the same time, because the common law forbids it; and the statute does not allow it. But he may plead two pleas; and

he takes the right with all its legitimate consequences; one of which is, that whenever there comes a demurrer upon either of the two lines of pleading, he may run back upon that line to see which party committed the first fault; and against that party judgment will be rendered. Aside from the *dicta* in question, there is not a shadow of authority, either here or in England, for a different doctrine.

Although it seems that no case upon this point has found its way into the books, I well remember that since the decision in *Miller v. Maxwell*, 16 Wend. 9, it has been several times announced from the bench, that in a case like this the defendant was at liberty to go back and attack the declaration; and I think the point has been more than once directly decided. I know that the late Mr. Justice COWAN entertained and expressed that opinion, as I did myself; and it is also the opinion of my present associates. I would not lightly overrule so much as a mere *dictum*, if it was of the nature of a rule of property, and had stood long enough to become one. But this is not a question of that kind.

*Judgment for the defendant.*⁶⁶

66. *Contra*: *Moore v. Leseur* (1851) 18 Ala. 606; *Supreme Lodge v. McLennan* (1898) 171 Ill. 417; *Wade v. Doyle* (1880) 17 Fla. 522.

McFADDEN v. FORTIER.

Supreme Court of Illinois. 1858.

20 Illinois, 509.

BREESE, J.: This is a proceeding by *scire facias* to foreclose a mortgage. * * *

The defendant filed three pleas, and to one of them, the third, there was a demurrer, which was sustained, and leave given to amend; and to this amended plea there was also a demurrer, which was also sustained.

The errors assigned question the correctness of these decisions.

The proceeding by *scire facias* to foreclose a mortgage, is a proceeding *in rem*, and the writ is considered both as

process and declaration, and defects therein can be reached by demurrer. *Marshal v. Maury*, 1 Scam. 231.

The defect in the writ is very apparent. It does not run in the name of "The People of the state of Illinois," as the constitution declares all writs and process shall run. The writ is void on its face, and the objection can be raised by general demurrer, though it would be more proper to reach it by motion to quash.

* * * * *

It is urged by the appellant that the demurrer to the amended plea should be carried back to the declaration.

* * *

As a general rule, when the declaration or *scire facias* is so defective that the judgment would be arrested, the demurrer would be carried back to it, and judgment given against the party committing the first error. But in this case the judgment would not be arrested on account of the imperfection of the writ, for appearance and pleading cure the defect; and this is the rule even in the case of void process like this. *Easton v. Altum*, 1 Scam. 250.

* * * * *

CUMMINS v. GRAY.

Supreme Court of Alabama. 1833.

4 Stewart and Porter, 397.

SAFFOLD, J.: * * *

* * * * *

The counsel for the plaintiff does not deny the general principle that a demurrer to a plea may reach the declaration; but it is contended, the circumstances of the defendant having demurred to the declaration; of his demurrer having been overruled; and of his having pleaded over, creates an exception to the rule; that, the circuit court having once passed on the sufficiency of the declaration, it was incompetent for the same tribunal, at a succeeding term, to reverse the decision; also, that the defendant having submitted to the first decision, he thereby waived the defect, if any, in the declaration, and could not afterwards, claim any

benefit from it; and that to adjudge it insufficient, on the demurrer to his several bad pleas, is to give him an advantage for his own wrong.

The principle is conceived to be well settled, that a demurrer to any part of the pleading may refer to the first error, and when filed by the plaintiff, to the plea, it may be visited on his own declaration, if defective and insufficient.

The position is equally correct, that a party who has acquiesced in a decision, by pleading over, amending the pleading, or otherwise varying the state of record in conformity to the decision, will be considered to have waived that question, and cannot afterwards claim a revision of it, *in the same form*, either in the same, or in the appellate court. But the same question may subsequently arise, in a *different form*, and require an independent adjudication; it may so happen, where a special plea, containing matter which would be good, under the general issue, has been overruled on demurrer, and the defendant offers evidence of the same defense under the general issue; or, it may be so, where a motion, in arrest of judgment is made, on the same objection to the declaration, for which a demurrer has been overruled;⁶⁷ and on the same principle, the supposed insufficiency of this declaration, was subject to an independent consideration, on the demurrer to the pleas; the same principle of decision, in either form, would produce a similar effect.

Many defects in a declaration may be cured, by pleading to the merits, either before or after a demurrer. So far as this effect has been produced, the plaintiff is entitled to the benefit of it, whenever the question subsequently recurs, whether on a second demurrer, on a motion in arrest of judgment, or in error. Where, however, the declaration does not contain a substantial cause of action, the insufficiencies cannot be cured by a plea to the merits.

* * * * *

67. *Accord*: Turnpike Co. v. Yates (1901) 108 Tenn. 428; Field v. Slaughter (1808) 1 Bibb. (Ky.) 160; Griffin v. The Justices (1855) 17 Ga. 96.

But the orthodox rule seems to have been that when once a demurrer has been filed and overruled, no objection can be argued on a motion in arrest of judgment which might have been argued on the demurrer. Chicago & Alton Ry. Co. v. Clausen, (1898) 173 Ill. 100; 2 Tidd's Practice, *918.

CULVER v. THIRD NATIONAL BANK.

*Supreme Court of Illinois. 1871.**64 Illinois, 528.*

[This was an action of *assumpsit* on four promissory notes. To the declaration a general demurrer was interposed and overruled. The general issue was then pleaded together with a special plea, and after a demurrer had been put in to the special plea and sustained, the cause went to the jury on the general issue. Verdict and judgment for plaintiff, from which defendant appeals.]⁶⁸

Mr. Justice BREESE delivered the opinion of the court.

* * * * *

Some question is made between the parties as to the right to carry a demurrer to a plea back upon the declaration. Where the general issue has not been pleaded, a demurrer to a special plea can, usually, be carried back to the declaration, and the judgment of the court had upon the declaration, and if that is bad, judgment will be rendered against it, on the principle that judgment will be rendered against the party committing the first error in pleading.

It has been oftentimes ruled by this court that, where a demurrer has been overruled and the general issue pleaded, a demurrer to a special plea cannot be carried back upon the declaration. *Wear v. Jacksonville & Savannah R. R. Co.*, 24 Ill. 593.

The court was called upon to review this doctrine in *Wilson, for the use, etc., v. Myrick*, 26 ib. 34, and said, we are now prepared to adhere to the rule laid down in the above case as being well supported by authority and most consistent with the philosophy of pleading; and further said, if the declaration be so defective that it will not sustain a judgment, that may be taken advantage of on a motion in arrest of judgment or on error.

The "philosophy" of the doctrine is that you cannot plead and demur to the same pleading at the same time. The same doctrine was announced in *Schofield v. Settley et al.*, 31 ib. 515; *Ward v. Stout*, 32 ib. 399.

68. Condensed statement of facts by the editor.

In a previous case (*Browner v. Lomax*, 23 ib. 443), where this point arose, the court said the record would present a strange appearance, if, after a demurrer to the declaration has been overruled and the general issue pleaded, a demurrer to a defective plea should be carried back to the declaration. The record would not look well with a general demurrer to a declaration overruled, and then carried back over the general issue, when filed to a defective special plea.

But of innate and substantial defects in the declaration, advantage can always be taken by motion in arrest of judgment or on error, as was said in *Wilson v. Myrick*, *supra*.⁶⁹

* * * * *

69. Compare, in this connection, *Fish v. Farwell* (1896) 160 Ill. 236, 241, where the court said: "The rule is, that the court will not carry a demurrer to replications back to pleas when a demurrer to such pleas has already been overruled. The party pleading over waives his demurrer and admits the sufficiency of the pleas. (*Stearns v. Cope*, 109 Ill. 340.) We do not understand the case of *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, to abrogate this rule. It merely holds that if, at any time before trial, the court becomes satisfied that an erroneous ruling has been made with respect to the sufficiency of a pleading, it has power to set aside the order made in regard thereto and correct the error. But here it is manifest that the court never became satisfied an erroneous ruling had been made in respect to the pleas, and therefore there was no occasion for exercising the power in question. And besides this, no application was made by appellants to the court for leave to withdraw their replication or to set aside the order overruling the demurrers. It is not the practice of the courts to give to parties that which they do not ask."

CHAPTER IV.

THE DECLARATION.

SECTION 1. FORMAL PARTS.

(a) *The Venue.*

CROOK v. PITCHER.

Court of Appeals of Maryland. 1883.

61 Maryland, 510.

ROBINSON, J., delivered the opinion of the court.

The declaration contains two counts: First count for obstructing a right of way belonging to the plaintiff; and the second for obstructing a highway used by the plaintiff in going to and coming from the post office, markets, school, and hauling the produce from his farm, in consequence of which he was obliged to use a *longer and more circuitous road*. The way or road thus alleged to have been obstructed *lies in Baltimore County*, and the venue is laid and the suit is brought in the *court of common pleas of Baltimore City*.

The first question arising on the demurrer, is whether the plaintiff had a right to sue the defendant in Baltimore City—and this depends upon whether the cause of action is *local or transitory*?

In the earlier history of the law, the plaintiff, it is well known, was required in all actions to state with the utmost certainly, not merely the county, but the particular district or hundred, within which the cause of action had arisen. This was necessary in order that the sheriff might summon as jurors, persons from the immediate neighborhood, who were presumed to be acquainted with the nature of the transaction, which they were called upon to try, and who were liable to be attained, if they rendered a wrong verdict. This was soon found, however, to be **extremely in-**

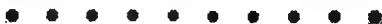
convenient, especially in mixed transactions which might happen partly in one place, and partly in another, and hence arose the distinction between *local* and *transitory* actions. If the cause of action could only have arisen in a particular place, the action is local, and the suit must be brought in the county or place in which it arose. Actions for damages to real property, actions on the case for nuisances, or for the obstruction of one's right of way are according to all authorities *local*.

On the other hand, actions for injuries to the person or to personal property, actions on contracts, and in fact all actions founded on transactions, which might have taken place anywhere, are transitory. *Mostyn v. Fabrigas*, Cowp. 161; *Mayor, etc., of Berwick v. Ewart*, 2 W. Black. 1036; Com. Dig. Action, N. 12.

Where the action is local, and the suit is brought in another place, the proper mode of taking advantage of the defect is by demurrer, and unless the defendant demurs, the defect will be cured by the Statute of Jeofails, 16 & 17 Car. II. This was decided in *The Mayor, etc., of London v. Cole*, 7 T. R. 588, in which GROSE, J., said: "I admit that where an action of covenant is brought on a privity of estate, and not of contract, the action must be brought in the county where the land lies; if it be not brought there, the defendant must take advantage of it before verdict, otherwise the defect is cured by the Stat. Car. II."

And again in *Mayor, etc., of Berwick v. Ewart*, 2 W. Black. 1070, where the cause of action arose in Berwick-upon-Tweed, and the venue was laid in Middlesex, to which the defendant filed a general demurrer, DE GREY, Chief Justice, said: "It is admitted that actions properly local must be laid in the proper counties; otherwise it is ground of demurrer."

The distinction between local and transitory actions still exists in this State. * * * An action for obstructing a way or highway being local, the suit must be brought in the county where the road lies, and the demurrer ought to have been sustained.



MOSTYN v. FABRIGAS.

*Court of King's Bench. 1774.**1 Cowper, 161.*

LORD MANSFIELD: This is an action brought by the plaintiff against the defendant, for an assault and false imprisonment; and part of the complaint made being for banishing him from the island of Minorca to Carthagenia in Spain, it was necessary for the plaintiff, in his declaration, to take notice of the real place where the cause of action arose; therefore, he has stated it to be in Minorca; with a *videlicet*, at London, in the parish of St. Mary le Bow, in the ward of Cheap. Had it not been for that particular requisite, he might have stated it to have been in the county of Middlesex. To this declaration the defendant put in two pleas. First, "not guilty;" secondly, that he was Governor of Minorca by letters patent from the Crown; that the plaintiff was raising a sedition and mutiny; and that in consequence of such sedition and mutiny, he did imprison him, and send him out of the island; which as governor, being invested with all the privileges, rights, etc., of governor, he alleges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it would be a justification in case it were true; but he denies the truth of the fact, and puts in issue whether the fact of the plea is true. The plea avers that the assault for which the action was brought arose in the island of Minorca, out of the realm of England and nowhere else. To this the plaintiff has made no new assignment, and therefore by his replication he admits the locality of the cause in action.

* * * * *

The next objection which has been made, is a general objection, with regard to the matter arising abroad; namely, that as the cause of action arose abroad, it cannot be tried here in England.

There is a formal and a substantial distinction as to the locality of trials. I state then as different things; the substantial distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in the wrong place. That is the case of all ejectments,

where possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties, the officers are county officers; therefore, the judgment could not have effect, if the action was not laid in the proper county.

With regard to matters that arise out of the realm, there is a substantial distinction of locality too; * * * So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.

But there is likewise a formal distinction, which arises from the mode or trial; for trials in England being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad; but the law makes a distinction between transitory actions and local actions. If the matter which is the cause of a transitory action arises within the realm, it may be laid in any county, the place is not material; and if an imprisonment in Middlesex it may be laid in Surrey, and though proved to be done in Middlesex, the place not being material, it does not at all prevent the plaintiff recovering damages; the place of transitory actions is never material, except where by particular acts of Parliament it is made so; as in the case of the churchwardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the court in time to change the venue; but if they go to trial without it, that is no objection. So all actions of a transitory nature that arise abroad may be laid as happening in an English County. But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at Westminster in Middlesex, and upon producing the deed, it bears date at Bengal, the action is gone; because it is such a variance between the deed and the declaration as makes it appear to be a dif-

ferent instrument. * * * If the true date or description of the bond is not stated, it is a variance. But the law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a venue only for form, and for the sake of trial, by a *videlicet*, in the county of Middlesex, or any other county. But no judge ever thought that when the declaration said in Fort St. George, viz., in Cheapside, that the plaintiff meant it was in Cheapside. It is a fiction of form; every country has its forms, which are invented for the furtherance of justice; and it is a certain rule, that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted. Now the fiction invented in these cases is barely for the mode of trial; to every other purpose, therefore, it shall be contradicted, but not for the purpose of saying the cause shall not be tried. So in the case that was long agitated and finally determined some years ago, upon a fiction of the teste of writs taken out in the vacation, which bear date as of the last day of the term, it was held, that the fiction shall not be contradicted so as to invalidate the writ, by averring that it issued on a day in the vacation; because the fiction was invented for the furtherance of justice, and to make the writ appear right in form. But where the true time of suing out a *latitat* is material, as on a plea of *non assumpsit infra sex annos*, there it may be shewn that the *latitat* was sued out after six years notwithstanding the teste. * * * Therefore the whole amounts to this; that where the action is substantially such a one as the court can hold plea of, as the mode of trial is by jury, and as the jury must be called together by process directed to the sheriff of the county; matter of form is added to the fiction, to say it is in that county, and then the whole inquiry is, whether it is an action that ought to be maintained. But can it be doubted that actions may be maintained here, not only upon contracts, which follow the persons, but for injuries done by subject to subject; especially for injuries where the whole that is prayed is a reparation in damages, or satisfaction to be made by process against the person or his effects, within the jurisdiction of the court? We know it is within every day's experience. I was embarrassed a great while to find out whether the counsel for the plaintiff really

meant to make a question of it. In sea batteries the plaintiff often lays the injury to have been done in Middlesex, and then proves it to be done a thousand leagues distant on the other side of the Atlantic. There are cases of offenses on the high seas, where it is of necessity to lay in the declaration, that it was done upon the high seas; as the taking a ship. There is a case of that sort occurs to my memory; the reason I remember it is, because there was a question about the jurisdiction. There likewise was an action of that kind before Lord Chief Justice LEE, and another before me, in which I quoted that determination, to shew, that when the Lord Commissioners of Prizes have given judgment, that is conclusive in the action; and likewise when they have given judgment, it is conclusive as to the costs, whether they have given costs or not. It is necessary in such actions to state in the declaration, that the ship was taken, or seized on the high seas, *videlicet*, in Cheapside. But it cannot be seriously contended that the judge and jury who try the cause, fancy the ship is sailing in Cheapside; no, the plain sense of it is, that as an action lies in England for the ship which was taken on the high seas, Cheapside is named as a venue; which is saying no more than that the party prays the action may be tried in London. But if a party were at liberty to offer reasons of fact contrary to the truth of the case, there would be no end of the embarrassment. * * * But as to transitory actions, there is not a colour of doubt but that every action that is transitory may be laid in any county in England, though the matter arises beyond the seas; and when it is absolutely necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you, and you shall not make use of the truth of the case against that fiction, but you may make use of it to every other purpose. I am clearly of opinion not only against the objections made, but that there does not appear a question upon which the objections could arise.

The three other judges concurred.

Per Cur. Judgment affirmed.

DOULSON v. MATTHEWS.

*Court of King's Bench. 1792.**4 Term Reports, 503.*

This was an action of trespass for entering the plaintiff's dwelling house in Canada, and expelling him; there was another count for taking his goods; but as there was no proof to support the second count, the only question was, whether an action of trespass could be brought in this country for the injury stated in the first count. Lord KENYON, at the trial, was clearly of opinion that the cause of action stated in that count was local; and as the plaintiff could not support the second count, he was nonsuited.

Erskine now moved to set aside that nonsuit; observing, that this was not an action to recover the land, but merely a personal action to recover a satisfaction in damages, which was transitory, and might be tried here. In a case of a similar nature, Lord MANSFIELD was of opinion that the action might be tried in this country. It was an action brought against Captain Gambier, for pulling down, by order of Admiral Boscawen, the houses of some settlers, upon the coasts of Nova Scotia, who supplied the sailors with spirituous liquors. In another case Lord MANSFIELD himself mentioned this, and said, "The objection was taken to the count for pulling down the houses; and the case of *Skinner and the East India Company* was cited in support of the objection. On the other side they produced, from a manuscript note, a case before Lord Ch. J. EYRE, where he overruled the objection. And I overruled the objection upon this principle, namely, that the reparation here was personal, and for damages; and that otherwise there would be a failure of justice; for it was upon the coast of Nova Scotia, where there were no regular courts of judicature; but if there had been, Captain Gambier might never go there again; and therefore the reason of locality in such an action in England did not hold." But Lord KENYON, Ch. J., said, that the contrary had been held in a case in the common pleas; that where the action is on the reality, it is local.

BULLER, J.: It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions; it is sufficient for the courts that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local.

*Rule refused.*⁷⁰

70. *Venue as Related to Jurisdiction.* This question received a thorough investigation by the House of Lords in *British South Africa Co. v. Companhia de Mozambique* (1893) 18 A. C. 631. That was an action brought by the plaintiff in England for trespass to lands situated in South Africa. The question was whether the English court had jurisdiction to try the action. LORD HERSCHELL, delivering the principal opinion, said: "It is, I think, important to observe that the distinction between local and transitory actions depended on the nature of the matters involved and not on the place at which the trial had to take place. It was not called a local action because the venue was local, or a transitory action because the venue might be laid in any county, but the venue was local or transitory according as the action was local or transitory. * * * The rule that in local actions the venue must be local did not, where the cause of action arose in this country, touch the jurisdiction of the courts, but only determined the particular manner in which the jurisdiction should be exercised; but where the matter complained of was local and arose outside the realm, the refusal to adjudicate upon it was in fact a refusal to exercise jurisdiction, and I cannot think that the courts would have failed to find a remedy if they had regarded the matter as one within their jurisdiction, and which it was proper for them to adjudicate upon."

And after quoting BULLER, J., in *Doulson v. Matthews*, LORD HERSCHELL continued: "In saying that we may not try actions here arising out of transactions abroad which are in their nature local, I do not think that the learned judge was referring to the mere technical difficulty of their being no venue in this country in which these transactions could be laid, but to the fact that our Courts did not exercise jurisdiction in matters arising abroad 'which were in their nature local.'"

(b) *Entitling.*⁷¹

PUGH v. ROBINSON.

Court of King's Bench. 1786.

1 Term Reports, 116.

This was an action on promises by bill. The declaration which was entitled generally of Michaelmas term, stated

71. The declaration should be entitled in both the court and term.—*Stephan on Pleading* (Tyler's Ed.) 383; 1 *Chitty on Pleading*, 261. But it was not the practice to entitle it in the name of the cause, the names of the parties being apparent from the commencement of the declaration.

the promises, and the breach thereof, to have been made on the seventh of November, 1785.

To this declaration there was a special demurrer; and the causes assigned were, "For that the said declaration appears to be exhibited, and is entitled, of Michaelmas term generally, whereby it has relation to, and must be deemed a declaration of, the first day of that term; whereas the said several promises, in the said declaration mentioned, are all of them therein laid to have been made by the said Richard (the defendant), and the said several causes of action therein also mentioned to have arisen, on the seventh day of November in the year of our Lord, 1785; which said seventh day of November was a day after the first day of that same Michaelmas term, wherein the said Mary (plaintiff) hath declared against him, the said Richard, and whereof the said declaration is so generally entitled as aforesaid. And also for that the said declaration, by the memorandum thereof, appears to have been exhibited before any of the causes of action of the said Mary therein mentioned appear to have accrued, etc."

Law, in support of the demurrer, contended, that the day of making the promises mentioned in the declaration must be consistent with the memorandum; but it appears on this declaration that the cause of action accrued subsequent to the time of filing of the bill. Filing a bill generally of such a term relates to the first day of that term. And there being no fraction of a day in judicial proceedings, the filing of the bill must relate to the first instant of that day; here, then, this bill must be taken to have been filed on the first instant of the 7th November; and even admitting that the promise was made on the same instant of that day, yet the breach must necessarily be subsequent to it in point of time. Though, on motions in arrest of judgment, and on trials at *nisi prius*, the court will enquire when the bill was actually filed, yet they will not on demurrer where such inquiry is precluded. He cited 2 Lev. 141, 176. Pull. N. P. 137. *Lord Porchester's case*, Tr. 23, Geo. 3, B. R.

Shepherd, contra, admitted that, if it appeared that the cause of action arose after the filing of the bill, the declaration was informal. But though in this case it refers to the 7th of November, which was the first day of the term, yet the term, for the purpose of delivering the declaration, cannot be considered to commence till the sitting of the

court. This is evident on adverting to the ancient practice of the court, when the parties declared *ore tenus*, which was minuted by the prothonotary; but on account of the great increase of business the present mode of delivering the declaration in writing was substituted in lieu of it. It is, therefore, clear that this declaration cannot be supposed to have been delivered before the sitting of the court; for till that time, by the old practice, the parties could not have declared *ore tenus*. And though the law does not in general allow of fractions of a day, yet the court will take notice of their usual time of sitting; before which time the contract might have been made and broken; and then the declaration may well be supported. *Symons and Low*, Sty. 72.

ASHURST, J.: The court ought to make any intendment against a mere captious objection. We must resort to the old practice of declaring *ore tenus*; and by reference to that, we find that the declaration could not have been delivered till the sitting of the court. And then it is as probable that the promise was made before the declaration as afterwards.

* * * * *

Demurrer overruled; but the court gave the defendant leave to amend, on payment of costs.⁷²

72. "It has been the practice, when the cause of action would admit, to entitle the declaration (whether by bill or original) generally of the term in which the writ is returnable."—1 Chitty on Pleading, 263. "It is the clear and undoubted practice of the court that the declaration should have been delivered as of the term when the writ was returnable. According to the ancient practice the declaration was actually delivered in the same term; it was only in case of the plaintiff that the time of actual delivery was enlarged; but still it must be considered as delivered *nunc pro tunc*."—*Smith v. Muller* (1790) 3 T. R. 624.

Compare *Stephan on Pleading* (Tyler's Ed.) 383, that "the term of which any pleading is entitled is usually that in which it is actually filed or delivered."

PAUL v. GRAVES.

Supreme Court of New York. 1830.

5 Wendell, 76.

Entitling of *narr*. The cause of action in this case arose on a promissory note due in February, 1830. The suit was

commenced by filing a declaration in the office of one of the clerks of the court, in pursuance of the statute, 2 R. L. 347, par. 1, on the 13th March, 1830. The declaration was entitled, "As of January term, in the year of our Lord one thousand eight hundred and thirty." * * *

J. L. Wendell, for plaintiff. The declaration must be entitled of some term, and when filed in vacation it must necessarily be as of the preceding term. It cannot be *special* as of a particular day, as when the cause of action arises *in term*, because it would be incongruous to say, "Of January term, that is to say, the 13th day of *March*, in the term of *January*, etc.," when March is not *term* time, but is in *vacation*. In analogy to the filing of a bill against an attorney or other officer of the court, the declaration, though filed in vacation, may be entitled as of the preceding term. Pleas and subsequent pleadings in a cause, although received in vacation, are always entered on the record as of the preceding term; so a judgment by confession, entered in vacation, is in like manner entered on the roll.

* * * * *

By the Court, MARCY, J.: It appears to me indispensable that the declaration should be entitled *specialy*, as when the cause of action accrues on a particular day in term, notwithstanding that it be filed in *vacation*; and although it may seem incongruous to entitle a declaration as of a particular day *in term*, when in fact the day of the filing is *not* in term, yet to preserve the regularity of legal proceedings, and at the same time carry into effect the provisions of the revised statutes on this subject, such course is unavoidable. Where, therefore, as in this case, the cause of action accrues in vacation, and the declaration is filed before the next term, it should be entitled as of the preceding term; as, for instance, "Of January term, to wit, the thirteenth day of March, in the term of January, in the year, etc." Unless this course be adopted, the consequence will be that the record when made up, will on its face be erroneous; it will purport to be a record in a suit commenced previous to the cause of action accruing. * * *

(c) *The Commencement.*⁷³

JOSEPH CHITTY: What is termed the *commencement* of the declaration follows the *venue* in the margin, and precedes the more *circumstantial statement* of the *cause of action*. It contains a statement: 1st. Of the names of the parties to the suit, and if they sue or be sued in another right, or in a political capacity (as executors, assignees, or *qui tam*, etc.), of the character or right in respect of which they are parties to the suit. 2d. Of the *mode* in which the defendant has been *brought into court*; and 3d. A brief recital of the *form of action* to be proceeded in. It is obvious that, independently of express regulation or precedent, some introduction to the substantial statement of the cause of action would be necessary, and the commencement adopted in practice is useful, as pointing out that the defendant is duly in court to answer the complaint, and concisely intimating the character in which the parties sue or are sued, and the nature of the action, by which the parties interested in the pleadings are enabled more readily to direct their attention to the subsequent parts of the declaration. 1 Chitty on Pleading, 285.

73. *Form of Commencement in the King's Bench.*

"Middlesex, (to wit) A B complains of C D, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case, etc. For that whereas, etc."

Form of Commencement in the Common Pleas.

"Middlesex, (to wit) C D was attached to answer A B of a plea of trespass on the case, etc., and thereupon the said A B, by E F, his attorney, complains, for that whereas, etc."

Form of Commencement in the Exchequer.

"Middlesex, (to wit) A B, a debtor to our sovereign lord the now king, cometh before the barons of his majesty's Exchequer, on — the — day of —, in the same term, by E F, his attorney, and complains by bill against C D, present here in court the same day, of a plea of trespass on the case, etc., for that whereas, etc."—2 Chitty on Pleading, 2-4.

(d) *The Conclusion.*

JOSEPH CHITTY: The declaration in personal and mixed actions should conclude to the damage of the plaintiff; unless in *scire facias* and in penal actions at the suit of a common informer; in the latter case, the plaintiff's right to the penalty did not accrue till the bringing of the action, and he cannot have sustained any damage by a previous detention of the penalty, it is not proper to conclude *ad damnum*. In an action by husband and wife for a bat-

tery, etc., of the wife, or whenever the wife is properly joined in the action, the declaration should conclude *ad damnum ipsorum*; and when the plaintiff sues as executor, administrator, or assignee of a bankrupt, it is usual to state that he was injured as such executor, etc. In debt the object of the action being to recover a sum of money *eo nomine*, the damages are generally nominal. But in *assumpsit*, covenant, case, replevin, trespass and other actions for the recovery of damages, the sum in the conclusion of the declaration must be sufficient to cover the real demand; for in general the plaintiff cannot recover greater damages than he has declared for, and laid in the conclusion of his declaration; and if judgment be given for more, it is error, and a court of error cannot reduce the sum to the amount stated in the declaration. If, therefore, the verdict be for more than the damages laid in the declaration, a remittitur should be entered as to the surplus before judgment. * * *

In point of *form* the usual conclusion in the King's Bench, is "to the damage of the said A B of*l.* and therefore he brings his suit," etc. In the common pleas, the conclusion is, "Wherefore the said A B saith that he is injured and hath sustained damage to the value (or 'amount') of*l.* and therefore he brings his suit," etc. In the Exchequer, the form runs, "To the damage of the said A B of*l.* whereby he is the less able to satisfy our said lord and king, the debts which he owes his said majesty at his Exchequer, and therefore he brings his suit," etc. By the above words *suit* or *secta* (*a sequendo*) were anciently understood the witnesses or followers of the plaintiff, for in former times the law would not put the defendant to the trouble of answering the charge till the plaintiff had made out at least a probable case. But the actual production of the suit, the *secta*, or followers, is now antiquated, though the form of it still continues. 1 Chitty on Pleading, 397.

SECTION 2. THE CAUSE OF ACTION.

BUCKLY v. WILLIAMSON

*Court of Queen's Bench. 1594.**Croke's Elizabeth, 325.*

Error of a judgment in debt upon an obligation. The error assigned was that the *teste* of the writ was 15 September, 32 Eliz. returnable *Octab. Michaelis*, and the money was due at Mich. 32 Eliz. and so after the *teste*, and before the return of the writ; and this appeared by the condition, which was entered *in haec verba*. And for this cause, although the judgment was after verdict, so that if there had been no original it had been good, yet it being brought before cause of action, the judgment was reversed: and it is not aided by the statute of 18 Eliz. c. 14.⁷⁴

74. This was the time when suit was deemed commenced in the common pleas, but in the king's bench suit was deemed commenced, not at the date of the writ, since the writ was frequently based upon a fictitious trespass for the sole purpose of giving the court a usurped jurisdiction, but at the time of filing the declaration (called there the bill).—*Foster v. Bonner* (1776) Cowp. 454.

SLATER v. FEHLBERG.

*Supreme Court of Rhode Island. 1903.**24 Rhode Island, 574.*

(1) TILLINGHAST, J.: There is a fatal variance between the writ and declaration in this case, and hence we are of opinion that the action must be dismissed.

The form of action set out in the writ is trespass on the case; while that set out in the declaration is trespass.

(2) Our statute relating to amendments is not sufficiently broad to enable the court to permit the form of action to be changed. *Wilcox v. Sherman*, 2 R. I. 540; *Thayer v. Farrell*, 11 R. I. 305; *Barnes v. Mowry*, ib. 422; *Dowling v. Clarke*, 13 R. I. 650; *Vaill v. Town Council*, 18 R. I. 405; *Wilson v. Ry. Co.*, ib. 598; see also *Hobbs v. Ray*, ib. 84.

(3) As a variance like the one in question may be taken advantage of at any stage of the case, the mere fact that the general issue and other pleas were filed by the defendants before taking the objection is immaterial. *Rathbun v. Ry. Co.*, 19 R. I. 463.

The case is remanded to the common pleas division, with direction to dismiss it.⁷⁵

75. "Anciently it was the practice in all actions to repeat the whole original writ in the declaration; and if a material variance appeared between the writ and the declaration, the defendant might take advantage of it, either by motion in arrest of judgment, writ of error, plea in abatement, or demurrer. Cro. Eliz. 829, *Norton v. Palmer*; Ibid. 185; *Edwards v. Watkin*; Ibid. 198; *Berkenhead v. Nuthall*; Ibid. 330; *Haselop v. Chaplin*; 2 Lectw. 1181; *Gins v. Dams*. But this practice was altered by a rule of the court of C. B. A. D. 1654, by which, it was ordered, that in future 'declarations, in actions upon the case, and general statutes, other than debt, should not repeat the original writ, but only the *nature of the action*; as that the defendant was attached to answer the plaintiff in a plea of trespass on the case, or in a plea of trespass and contempt against the form of the statute.' And it should seem, that even in trespass *vi et armis* in the common pleas, or commenced by original in the king's bench, it would now be deemed sufficient to state in the declaration, that the defendant was attached to answer the plaintiff in a *plea of trespass*, without setting forth the writ; at least this has been held sufficient on a *general demurrer* as far back as 2nd of William and Mary, Carth. 108, *Lambert v. Thurston*, and I should think would at this day be held good on a special demurrer. For this short recital is intended only as an intimation to the court of the nature of the action."—Sergeant Williams' note to *Redman v. Edolph*, 1 Saund. 318.

STABLES v. ASHLEY.

Court of Common Pleas. 1797.

1 Bosanquet & Puller, 49.

A rule was obtained by *Shepherd*, Serjt., on a former day, to shew cause why the proceedings in this action should not be set aside for irregularity. A *quare clausum fregit* having been sued out by the plaintiffs against *Ashley*, *Frost*, and *Grignon*, and *Ashley's* attorney served with a copy of the process, he searched the Filazer's Book, and found a memorandum of a warrant of attorney in the action against all three, and accordingly on the 3d of May entered one joint appearance for them, though he had authority from *Ashley* only; on the 4th of May he was served with a notice of declaration; on the 5th he took it out of the office,

and found that *Ashley* was the only one of the three declared against.

Le Blanc, Serjt., for the plaintiffs, contended, 1st, that as it was not aailable process, the proceedings were regular, and cited *Yardly v. Burgess*, 4 T. R. 697, in the note, and *Spencer v. Scott* decided in this term; 2d, that if there were any irregularity, it had been waived by the defendant's taking the declaration out of the office; and 3d, that the defendant's attorney was equally irregular with plaintiffs, having entered a joint appearance for all three, when authorized by one only.

Shepherd, *contra*, insisted, that the writ and appearance being joint, and the declaration several, there was no process to warrant it; that the case of *Spencer v. Scott* went upon the possibility of the additional defendant's being a fictitious person like *John Doe*, but here the service included all three; that taking a declaration out of the office is a waiver if irregularity in the process, because the defendant is acquainted with that before he goes to the office, but not of irregularity in the declaration, for he must take out that before he can ascertain whether it be irregular or not; he added, that by the present mode of proceeding the revenue would be defrauded.

PER CURIAM. The attorney has taken upon himself to enter an appearance for three, having an authority from one only; the court therefore, if necessary, might cure the whole irregularity by setting aside the appearance as to two of the defendants, and letting it stand for *Ashley* only. Unless we found ourselves bound by the strictest authorities, we would not countenance such an objection as this; but the practice seems against this objection; the distinction is between processailable and notailable; in the latter a declaration may be delivered against one, though any number be mentioned in the writ, and no inconvenience can result from it; we will not distinguish between *John Doe* and a real defendant, in order to raise an objection.

Rule discharged without costs.

ROGERS v. JENKINS.

*Court of Common Pleas. 1799.**1 Bosanquet & Puller, 383.*

A *clausum fregit* having issued against the defendant at the suit of *T. Rogers* and *F. Barber*, a summons was made out in the sheriff's office at the suit of *T. Rogers* only, and served on the defendant; to which he entered an appearance; on discovery of the mistake, another summons was made out at the suit of both plaintiffs, and served on the defendant, but not till four days after the writ was returnable; to this no appearance was entered; a declaration was afterwards delivered in the name of both plaintiffs, and judgment was signed for want of a plea. *Le Blanc*, Serjt., having on a former day obtained a rule *nisi* for setting aside this judgment for irregularity,

Runnington, Serjt., now shewed cause, and contended, 1st, that any irregularity in the service of the process was waived by appearance. 2nd, that the variance was immaterial, it having been determined in *Hally v. Tipping*, *C. B.* 3, *Wils.* 61, that if a plaintiff arrest a defendant in his own right, he may declare against him as executor if he will waive his bail, and in *Lloyd v. Williams*, *C. B.* 3, *Wils.* 141, 2 *Black.* 722, *S. C.*, that a plaintiff who has sued out a *capias* in his own name, may declare *qui tam*.

Sed per EYRE, *C. J.*: The defendant has appeared to a suit commenced against him by *T. Rogers*, and now he is declared against by *T. Rogers* and *F. Barber*. The question is, whether the declaration be warranted by any process? It is a very different case where a plaintiff sues out a writ as executor, to which the defendant appears; for in such case the defendant is before the court, at the suit of the person named in the writ, whether that person declare in his own right, or in *auter droit*.⁷⁶ The defendant in this case has never been called upon to answer *F. Barber*, who cannot therefore require him to put in a plea.

Per Curiam. Rule absolute.

76. But if the writ designates the plaintiff in a special character, as executor or *qui tam* or assignee, the declaration must be in the same character and cannot be by the plaintiff generally.—*Canning v. Davis* (1769) 4 *Burr.* 2417; *Delves v. Strange* (1795) 6 *T. R.* 158; *Turing v. Jones* (1793) 5 *T. R.* 402.

COYLE v. COYLE.

*Supreme Court of New Jersey. 1856.**26 New Jersey Law, 132.*

This was a *certiorari* to a justice of the peace, brought to review the proceedings and judgment in an action of debt, in which the administrator of James Coyle, deceased, was plaintiff, and Patrick Coyle was defendant. The summons was for *thirty dollars*. The demand filed was for a book account and interest, amounting in all to \$100. On the return day of the summons, the plaintiff appeared, and the defendant sent word that he wished an adjournment, which was granted. On the adjourned day the parties appeared, and a further adjournment was granted at the plaintiff's request. On the last adjourned day the plaintiff appeared; the cause proceeded to trial in the absence of the defendant, and judgment was entered for the plaintiff for \$100 debt, besides costs. The reason chiefly relied on for reversal was, that the summons was for \$30, and the demand and judgment for more than that amount.

POTTS, J.: If on the return day of the summons, or at any adjourned day subsequently, in case the defendant had never appeared to the action, the cause had been tried, and judgment entered in his absence, there is no doubt the variance between the summons and state of demand would have been fatal; because in such case the plaintiff proceeds at his peril, and to maintain his judgment, must show that all his proceedings are regular. A defendant summoned to answer to a demand of \$30, may decline appearing to the suit, for the very reason that he is satisfied he justly owes that amount, and is willing the plaintiff should take his judgment for the sum demanded; but it would be a gross wrong to him if the plaintiff could summon him into court to answer to a demand for a sum he does not deny that he owes, and then turn round and demand, and recover in his absence, a much larger sum against him. The 13th section of the act constituting courts for the trial of small causes (Nix. Dig. 393), in expressly directing that the justice shall enter in the body of the summons the sum demanded, and endorse the same on the writ, and in providing that if the defendant shall pay the same and costs without any further proceedings, the constable shall receive the same, and that his receipt shall be a full discharge from such debt,

etc., shows very clearly that it was the design of the legislature that the real debt claimed should be inserted in the process.

But the defendant's difficulty in this case is, that he did appear before the justice on the return day of summons.

* * *

The purpose of the writ was to bring the defendant into court, and he came. The purpose of the state of demand was to apprise him of the particulars of the demand, and he took no exception to the variance. He subsequently appeared on the day to which the case was first adjourned, and the plaintiff then obtained a further adjournment; and finally the defendant suffered the cause to be tried in his absence. He cannot now go behind these proceedings and interpose the objection that the summons and state of demand varied in amount.

* * * * *

*The judgment must be affirmed.*¹⁷

77. *Accord*:—Weld v. Hubbard (1850) 11 Ill. 573 (action of debt); Holmes v. Budd (1860) 11 Iowa, 186.

In Dabneys v. Knapp (1845) 2 Gratt. (Va.) 354, the variance between \$500 named in the writ and \$600 named in the declaration was held immaterial where the jury found a verdict on default for \$455.16. The action was *assumpsit*.

READ v. BROWN.

Court of Appeal. 1888.

Law Reports, 22 Queen's Bench Division, 128.

Appeal from an order made by Sir JAMES HANNEN at chambers directing the issue of a writ of prohibition.

The action was commenced in the mayor's court by the plaintiff as assignee of a debt of 16 l. 13 s. 4d., the price of goods supplied by a firm of Brown & Co. to the defendant. The sale and delivery of the goods appeared to have taken place respectively in Surrey, without the jurisdiction of the mayor's court, but it was alleged by the plaintiff that the vendors had executed an absolute assignment of the debt in his favor at 71 Fleet Street, a place within the jurisdiction of the mayor's court, and that he had given the defendant express notice in writing of the assignment so executed.

POLLOCK, B.: I am of opinion that this appeal should be allowed. The expressions "cause of action," and "part

of the cause of action" have long been judicially defined as meaning respectively the material facts and any material fact in the case for the plaintiff. I need only refer to the judgment of PARKE, B., in *Buckley v. Hann*, 5 Exch. 43, and to that of the present Master of Rolls in *Cooke v. Gill*, L. R. 8 C. P. 116. Here the fact of the assignment of the debt is a material fact in the case for the plaintiff, and therefore a part of the cause of action. * * * * *

The defendant appealed.

LORD ESHER, M. R.: The question which we have to decide is whether any part of the cause of action arose in the city; if it did, then upon the proper construction of the Mayor's Court Act, the mayor's court had jurisdiction to try the case. What is the real meaning of the phrase "a cause of action arising in the city?" It has been defined in *Cooke v. Gill*, L. R. 8 C. P. 107, to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. It has been suggested today in argument that this definition is too broad, but I cannot assent to this, and I think that the definition is right. If that is so, the question arises whether the plaintiff, in order to be entitled to succeed in his action, would not be bound to prove the assignment to him of the debt; not merely whether he would be bound to prove it in an action in the mayor's court, but whether he would be bound to prove it in any court in which he might sue, and whether an allegation of the assignment might not have been traversed by the defendant. I cannot bring myself to entertain a doubt that the assignment is a fact which the defendant might traverse and if that be so, the plaintiff would be bound to prove it.

* * * * *

FRY, L. J.: I am of the same opinion. Everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action. If the plaintiff in the present case were to fail at the trial to prove the assignment he could not succeed; therefore part of his cause of action did arise in the city.

* * * * *

Appeal dismissed.

SOUTH FLORIDA TELEGRAPH COMPANY v.
MALONEY.

Supreme Court of Florida. 1894.

34 Florida, 338.

LIDDON, C. J.:

* * * * *

The theory upon which the plaintiffs below evidently brought their suit was that the defendant owed to them, as a portion of the general public, the duty to transmit telegrams from Tampa to Key West, both places being in the State of Florida. It is an elementary principle in the law of pleading, that the declaration upon which a plaintiff founds his right of recovery must allege every fact that is essential to his right of action. Gould on Pleading, § 7, p. 160. When the plaintiff's right consists of an obligation of the defendant to observe some particular duty, whether founded upon some contract between the parties, or on the obligation of law arising out of the defendant's particular character or situation, the declaration must specifically state the nature of such duty. The statement must set out distinctly the circumstances which create the liability of the defendant. This statement may be concise and brief, but must be specific and definite. 1 Chitty on Pleading (16th Ed.), p. 397; *Max v. Roberts*, 12 East, 89. If the declaration does not comply with these requirements, it must go down before a demurrer. *Louisville, New Albany & Chicago Ry. Co. v. Corps*, 124 Ind. 427, 24 N. E. Rep. 1046, 8 L. R. A. 636. Tested by these principles the declaration in this case is fatally defective. The declaration contains three counts. In none of them is there any allegation to show that it was the duty of the defendant to transmit the message set out in each of said counts. There is no allegation that defendant owned or operated any telegraph line; that such line extended from Tampa to Key West; that it was engaged in the business of transmitting messages by telegraph or electric wire for reward paid to them; or that it held itself out to the public as so doing; or that it had any facilities for sending telegraphic messages from Tampa to Key West; or was engaged in the business of so doing. Substantially all that is alleged is, that the defendant was a corporation under the name of the South Florida

Telegraph Company; that one of the plaintiffs at Tampa desired them "to act within the scope of their business," and transmit the message to the other plaintiff at Key West, and was ready and willing to pay therefor, and demanded that they transmit the message as aforesaid. It seems by the implication of the declaration that the defendant had an office at Tampa. These statements imply no liability of defendant for refusing to transmit the message. True, the defendant appears to be a corporation, and its corporate name would indicate that it was organized for the purpose of operating a telegraph line and transmitting messages thereby, but it does not follow that it had completed its line or begun business, and the simple fact of the organization of a corporation for that purpose does not, before it can construct its lines and engage in the business, make it liable for refusing to transmit a message offered it for transmission. * * *

The judgment of the circuit court is reversed, with directions to sustain the demurrer to the declaration, with leave to the plaintiffs to amend if they desire to do so.

HOWELL v. YOUNG.

Court of King's Bench. 1826.

5 Barnwall & Creswell, 259.

[Action against an attorney for negligence in investigating the validity of certain mortgages as security for a loan, whereby the plaintiff suffered a loss of interest on the loan. Defendant pleaded not guilty and the six-year statute of limitations. On the trial it appeared that the act of the defendant occurred more than six years before action brought, but that it was not discovered until a date within six years prior to action brought, at which date a loss for the first time occurred. Verdict for the defendant. Plaintiff obtained a rule *nisi* for a new trial on the ground, that the statute of limitations ran not from the time when the insufficient security was taken, but from the time when the loss accrued.]⁷⁸

78. Condensed statement of facts by the editor.

BAYLEY, J.: This is a case of no difficulty whatever. The only question is, what is the cause of action disclosed in this declaration? It appears to me that the misconduct of the defendant is the gist of the action. If the allegation of special damage had been wholly omitted, the plaintiff would have been entitled to a verdict for nominal damages. The plaintiff in this action is entitled to recover a compensation in damages for the injury resulting to him from the misconduct of the defendant. The special damage resulted from that misconduct; but it constituted part only of the injury sustained by the plaintiff, and it is not of itself a cause of action. The declaration is framed so as to shew that the misconduct of the defendant is the cause of action. It states that the plaintiff had contracted to lend 3000*l.* at interest, to be secured by a warrant of attorney and mortgages of specific property there described, provided the warrant of attorney and the mortgages should turn out to be a valid and sufficient security for the same; that the plaintiff retained the defendant (he being an attorney) to ascertain whether they would be a sufficient security; and that it became the duty of the defendant to use due care and diligence to ascertain whether they would be so or not. It then states, that the defendant did not use due care and diligence in that respect, but omitted so to do; and, on the contrary, represented to the plaintiff that the warrant of attorney and mortgages would be a sufficient security, whereupon the plaintiff advanced the money; and that the warrant of attorney and mortgages were not a sufficient security, but were invalid and insufficient securities. Now, if the declaration had stopped there, a sufficient cause of action is stated. There is an acceptance of the retainer by the defendant, a duty resulting therefrom, and a breach of that duty. But the declaration goes on to state: "By reason whereof the plaintiff has wholly lost the interest due on the sum of 3000*l.* and is likely wholly to lose the said principal sum of 3000*l.*" Now, does the introduction of that allegation vary the case? In an action for words which are actionable in themselves, a special damage is frequently alleged in the declaration, although it is not the ground of the action, and the plaintiff may recover without proving the special damage. In such case the allegation of special damages is a mere explanation of the manner in which the conduct of the defendant has become injurious to the plain-

tiff. So in this case, the purpose for which the allegation is introduced, is precisely similar. Where, indeed, words are not actionable of themselves, but become so by reason of the consequential damage, then it must be alleged and proved; because it constitutes the cause of action. In an action of *assumpsit*, the statute of limitations begins to run not from the time when the damage results from the breach of the promise, but the time when the breach of promise takes place. The case of *Short v. McCarthy*, 3 B. & A. 626, which is very analogous to the present, is an authority in point. There the declaration in *assumpsit* stated as a breach of the promise, that the defendant did not diligently and sufficiently make a search at the bank of England to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do. The omission to search took place more than six years before action brought, although it was not discovered by the plaintiff till within the six years. The statute of limitations having been pleaded, it was held, that upon this form of declaration the plaintiff was not entitled to recover on the ground that the cause of action accrued at the time of the breach of duty or promise by the defendant, and not at the time of its discovery by the plaintiff; and that the statute began to run from the time when the defendant ought to have made the search, which it was his duty to do. It appears to me that there is not any substantial distinction between an action of *assumpsit* founded upon a promise which the law implies, that a party will do that which he is legally liable to perform, and an action on the case which is founded expressly upon a breach of duty. Whatever be the form of action, the breach of duty is substantially the cause of action. That being so, the cause of action accrued at the time when the defendant in this case took the bad and insufficient security, that was more than six years before the commencement of the action, which was consequently barred by the statute of limitations. The rule for a new trial must therefore be discharged.

HOLROYD, J.: I am of opinion that the statute of limitations is a complete bar to this action. The cause of action is the misconduct or negligence of the attorney. The statute of limitations is a bar to the original cause of action, and to all the consequential damages resulting from it,

unless, indeed, it can be shewn that those damages, or any part of them, constitute a new cause of action which accrued within six years. I think it makes no difference in this respect, whether the plaintiff elects to bring an action of *assumpsit* founded upon a breach of promise, or a special action on the case founded upon a breach of duty. The breach of promise or of duty took place as soon as the defendant took the insufficient security. Whether the plaintiff, therefore, elect to sue in one form of action or another, the cause of action, which in either form is substantially the same, accrued at the same moment of time. The breach of duty, therefore, constituting a cause of action, it follows that the statute of limitations is a bar to this action, unless the special damage alleged in the declaration constitute a new cause of action. *Fetter v. Beal*, 1 Salk. 11, is an authority to shew, that the special damage alleged in this case does not constitute any fresh ground of action, but that it is merely the measure of the damage which results from the original cause of action. There the declaration stated that the defendant beat the plaintiff's head against the ground, and that he brought an action of assault and battery for that and recovered; and that since the recovery by reason of the same battery, a piece of his skull had come out. The defendant pleaded in bar the recovery mentioned in the declaration; and averred it to be for the same assault and battery. The plaintiff demurred, and it was urged that this subsequent damages was a new matter which could not be given in evidence in the first action, when it was not known; and it was compared to the case of a nuisance, where every new dropping is a new act. But Holt, C. J., said, "Every new dropping is a *new nuisance*, but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the trial." So, here the loss of interest does not constitute a fresh ground of action, but a mere measure of damages. There is no new misconduct or negligence of the attorney, and consequently there is no new cause of action. What is said by Holt, C. J., explains the principle of the decision in *Gillon v. Bodington*, 1 R. & M. 161; there, although the excavation was made in the life of the father, it was continued after his death, and after the title of the remainderman had accrued.

The continuance of the excavation was a continuing nuisance, and constituted a new cause of action. It was, therefore, properly decided in that case, that the remainderman was entitled to recover damages for an injury to him arising from the falling of a wall after the death of his father, but here there was no new misconduct of the attorney. As the consequences of the battery in *Fetter v. Beal*, did not constitute a fresh ground of action, so the consequential damage resulting from the misconduct of the attorney of this case does not constitute any new ground of action. In this case Lord HOLT was of opinion that the jury upon the trial in the first action must have taken into their consideration not merely the actual loss which the plaintiff had then sustained, but the probable loss which the plaintiff was likely to suffer in consequence of the injury. So here, if the action had been brought immediately after the insufficient security had been taken, the jury would have been bound to give damages for the probable loss which the plaintiff was likely to sustain from the invalidity of the security. It appears to me, therefore, that the subsequent special damage alleged in this declaration did not constitute any fresh cause of action. That being so, the cause of action did not accrue within six years, and the rule, therefore, must be discharged.

LITLEDALE, J., concurred.

BAYLEY, J., referred to *Brown v. Howard*, 2 B. & B. 73.
*Rule discharged.*⁷⁹

79. "The object of compelling a party in his declaration, to lay a foundation for the recovery of special damages, which do not necessarily arise from the act complained of, is, to prevent the surprise, which might otherwise ensue to the defendant, on the trial."—*Barnum v. Vandusen* (1844) 16 Conn. 200, 205.

STEVENS v. LOCKWOOD.

Supreme Court of New York. 1835.

13 Wendell, 644.

Error from the Washington common pleas. Lockwood sued Stevens in a justice's court, and declared in *assumpsit* for goods sold and delivered, specifying *one barrel of soap*

and 108 fowls. The defendant pleaded the general issue, and gave notice that he would prove on the trial that, in a former suit against him the plaintiff declared on and brought in an account of which his *demand now presented* formed a part, and which could not be separated from the residue of the demand *then presented*. On the trial, the plaintiff proved his demand for the fowls. The defendant then proved the former suit, which was in *assumpsit*, and that two items of the plaintiff's demand on that trial were as follows: "lot of fowls, \$8.00; 3/4 Bll. soap, \$3.25;" which items were entered in an account book of the defendant, which was produced in evidence on the trial of that cause, and contained the following *other* items of *credit* to the plaintiff, viz., "1828, balance on the note with Atwood, 44/100; rent of house, \$48; rent of house, \$9; fixing bedstead, 50/100; ride to Granville, 25/100; one day's work, \$1.25; wood, 98 feet, \$1.77;" making a total of \$123.46, and which account was admitted by the defendant. On the *debit* side of the account, there were twenty-three items charged by the defendant against the plaintiff, amounting to \$104.03, all of which were admitted by the plaintiff, except one charge of \$45, which was the only matter in dispute on that trial. By the defendant's account book thus produced, it appeared that the first charges were made in July, 1828, and from that time at various dates up to January, 1830; the charges for the fowls and soap were made in July, 1829. Before the cause was submitted, the plaintiff withdrew the two items for *fowls* and *soap* from the consideration of the jury who tried the cause, and who found a verdict for the plaintiff, for \$35.39. The counsel for the plaintiff stated on the second trial that the two items for *fowls* and *soap* were withdrawn on the first trial, so that the verdict should not exceed the jurisdiction of the justice. After hearing these proofs, the justice rendered judgment for the plaintiff for *nine dollars damages*, and costs of suit. On *certiorari*, the common pleas *affirmed* the justice's judgment, and the defendant sued out a writ of error.

By the Court, SAVAGE, Ch. J.: It is difficult to distinguish this case from *Guernsey v. Carver*, 8 Wendell, 492. There the plaintiff's account consisted of *seven* items of merchandise sold and delivered between the 20th July and 27th August, 1828—amount, \$2.35. The defendant pleaded a

former suit, and prevailed before the justice. In the common pleas of Monroe, upon appeal, it appeared that the plaintiff had an account against the defendant of twenty articles of merchandise between the 4th June and 27th August, 1828—amount between \$5 and \$6; that of the first trial, he proved items from 4th June to 19th July. The defendant pleaded a tender and prevailed. The second suit was for items between the 20th July and 27th August. It was assumed that the first trial was after the whole account had accrued. The court decided, that in a *running account*, where no special contract was entered into, each separate delivery formed a separate cause of action, and that separate suits might be brought for each. This court *reversed* the judgment, considering the amount *one entire and indivisible demand*, putting it upon the principle of previous cases. Mr. Justice NELSON says, the whole amount being due when the first suit was brought, it should be viewed in the light of an entire demand, incapable of division for the purpose of prosecution. This has been followed since. It is true, that the case particularly referred to, of *Miller v. Covert*, 1 Wendell, 487, arose upon a contract to deliver three tons of hay. The hay was delivered in separate parcels; but the contract was one. Such also were the cases of *Farrington v. Payne*, 15 Johns. R. 432, *Smith v. Jones*, 15 *Id.* 229, and *Willard v. Sperry*, 16 *id.* 121.

The case of *Philips v. Berwick*, 16 Johns. R. 136, illustrates the distinction between suits for separate and distinct causes of action, and a second suit on the same identical account, though for different items. The action was for work and labor performed before the 8th of March, 1817. The defendant showed that in September, 1817, the plaintiff recovered against him for work and labor, laid in the declaration to have been done on the 8th of March, 1817. The court of common pleas of Montgomery County held it conclusive for the defendant, and nonsuited the plaintiff. This court reversed the judgment, on the ground that the plaintiff might show that the work, etc., was entirely different from that, for which he had recovered in the former suit, and performed under a *distinct contract*. Mr. Justice SPENCER says, that there is no case or dictum which requires several and *distinct causes of action* to be joined in one suit. The plaintiff may elect to sue upon them separately, and it is no objection that they belong to the same family

of causes, provided their identity is not the same. He distinguishes the cases then before the court from *Markham v. Middleton*, 2 Str. 1259, which was for an apothecary's bill for 333*l.*, which the court considered an *entire demand*; and it was so considered by Lord KENYON, in speaking of it. The rule laid down in *Guernsey v. Carver*, is in accordance with the case *Markham v. Middleton*, and with good sense, and not opposed at all to the principle in *Philips v. Berwick*. It is applicable to this case. Although this is not a merchant's account, it is one *continuous account*; and, in the meaning of the preceding cases, *indivisible*. One suit, and only one, should be sustained. Upon a contrary principle, a separate suit might be brought for every separate item of an account; and twenty, or more, might be brought where only one was necessary.

Judgment reversed.

SECTION 3. NECESSARY ALLEGATIONS.

(a) *Time.*

GRAY v. SIDELINGER.

Supreme Judicial Court of Maine. 1881.

72 Maine, 114.

On exceptions to the ruling of the court in overruling the defendant's demurrer.

WALTON, J.: This is an action to recover damages for an alleged libel upon the plaintiff. The action is before the law court on demurrer to the plaintiff's declaration. The plaintiff says that the defendant wrote to the commissioner of pensions representing that the plaintiff was not injured in the service of the United States, whereby he was prevented from obtaining a pension; but he has omitted to state when the supposed letter was written, or when it was sent to the commissioner; and this omission is urged as one ground for sustaining the demurrer. "In personal actions," says Mr. Stephen, "the pleadings must allege the time, that is, the day, month, and year, when each travers-

able fact occurred." Stephen on Pleading, 292. And such is the adjudicated law of this State. *Platt v. Jones*, 59 Maine, 232; *Gilmore v. Mathews*, 67 Maine, 517. And see 1 Chitty, 257.

*Exceptions sustained.*⁸⁰

80. *An impossible day* is the same as no day at all, and lays the pleading open to a special demurrer:—*Ring v. Roxbrough* (1832) 2 Comp. & J. 418.

Merely to allege that an act took place "heretofore" is not sufficient:—*Andrews v. Thayer* (1873) 40 Conn. 156. Nor is a pleading sufficiently certain as to time when it alleges an act as occurring "the day and year aforesaid," when there are several days previously mentioned:—*Haven v. Shaw* (1852) 23 N. J. L. 309.

Time which is matter of description of an instrument, as its date, is material and must be proved as laid:—*Streeter v. Streeter* (1867) 43 Ill. 155.

Phillips says:—"Upon the subject of variance, a distinction is now fully established between allegations of matter of substance, and allegations of matter of description. The former require to be substantially proved; the latter must be literally proved. Thus, if the declaration states, that on such a day the defendant drew a bill of exchange, without alleging that it bore date on that day, the day in the declaration is immaterial. But, if it be alleged, that the defendant made his bill of exchange bearing date on a particular day, and the date of the bill is different, it will be a substantial variance:"—Phillips on Evidence, Bk. 2, p. 1.

A time alleged in one pleading should regularly be followed in subsequent pleadings, as where the plaintiff alleged a trespass on a certain day the defendant should justify as of the *same day*, even though this is not the true date, for otherwise there would be a discrepancy in respect to time on the face of the record. But if a deviation is necessary, as when defendant pleads justification by legal process bearing date after the date mentioned in the declaration, then the true date, differing from that laid by the plaintiff, may be alleged, but in such cases the defendant should either traverse the time or allege that the trespass justified is the same as that complained of in the declaration.—Gould on Pleading, ch. III, §§ 73-79.

"*But in pleading any matter of discharge*; as a release—accord and satisfaction—a prior judgment or award, deciding the matter in controversy—payment, or tender of a pre-existing debt, or any other defense, operating as a discharge or extinguishment of any prior liability—the defendant is never required to follow the day mentioned in the declaration. * * * Since all matter of discharge must, from its nature, have accrued subsequently to the creation of the duty or liability upon which the action is founded. It is therefore manifest, that in pleading any matter of discharge, the defendant not only *may*, but (to make his plea sufficient) *must*, state the defense as having accrued after the cause of action arose."—Gould on Pleading, chap. III, § 82.

BROOK v. BISHOP.

Court of Queen's Bench. 1702.

2 Lord Raymond, 823.

Trespass. The plaintiff declared, that the defendant the second of April broke and entered the plaintiff's close, *et*

herbam suam pedibus ambulando conculcavit et consumpsit, necnon arbores suas, viz., decem populos, etc., succidit cepit et asportavit, transgressiones praedictas a praedicto secundo die Aprilis diversis diebus et vicibus usque the twenty-eighth of the said month of April continuando. Upon not guilty pleaded, verdict was given for the plaintiff, and entire damages. Upon which Mr. Branthwaite for the defendant moved in arrest of judgment, that the cutting of the trees could not be laid with a *continuando*; and therefore entire damages being given, the jury shall be intended to have given for that as well as for the other trespasses. And therefore judgment ought to be arrested, because no damages ought to have been given for that. And HOLT, Chief Justice, said, that it was time that this exception should be settled; and that in order to effect it, they would consider among themselves, and give judgment after deliberate consideration had. And afterwards at another day HOLT, Chief Justice, declared, that they were all of opinion, that the plaintiff ought to have his judgment, because they held the *continuando* as to the trees to be void, because the cutting of trees does not lie in continuance; and then they would intend, that no part of the damages was given for it; but the *continuando* shall be applied to the trespasses that lie in continuance. And as to the objection, that the plaintiff at the trial, perhaps, gave evidence of cutting at several days, by reason of the *continuando*; he answered, that that shall not be intended, since in point of law only evidence of one cutting could be given, for the *continuando* is void. The proper way to declare, where a man will give evidence of several trespasses, which do not lie in continuance, is to say, that the defendant *diversis diebus inter* such a day and such a day cut divers trees; and then he may give evidence of a cutting upon any of the days between the days mentioned in the declaration. See 21 Hen. 6, 43. Judgment for the plaintiff.

(b) *Place.*

DUYCKINCK v. CLINTON MUTUAL INSURANCE COMPANY.

Supreme Court of New Jersey. 1852.

23 New Jersey Law, 279.

This cause was heard before the Chief Justice and Justices NEVIUS and OGDEN, at November term, 1851, upon a special demurrer to the declaration.

The CHIEF JUSTICE. In an action of debt to recover a judgment, the declaration avers that the judgment was recovered *in the Supreme Court of New York, to wit, at Newark, in the county of Essex*. The defendant demurs specially, and assigns for cause that the declaration does not sufficiently allege where the judgment was recovered.

It is an elementary rule of all pleadings in personal actions, that every material traversable fact must be stated with convenient certainty of time and place. 6 Com. Dig. 48, 50, "Pleader," c. 19, 20, p. Archbold's Civ. Pl. 116; Gould's Pl. 111, § 102; 1 Chit. Pl. (7th Ed.) 290, 306-7.

The declaration, we are told by high authority, is but an amplification of the original writ, with additional circumstances of *time* and *place*. 3 Bl. Com. 293. The object of stating the place in the declaration is twofold, viz.: 1. To obtain convenient certainty in pleading. 2. To ascertain the *venue*, or place where the trial shall be had. Ordinarily the double end is attained by alleging that the cause of action arose at some place within the county where the *venue* is laid. If the action be local, and the place be truly stated, or if the action be transitory, and there be no need of stating where the cause of action actually arose, the introduction of the *videlicet* is neither necessary nor useful. But when, in a transitory action, it becomes necessary or expedient, as matter of description or otherwise, to state where the contract was made, or the cause of action actually arose, and the place thus stated is out of the county in which the *venue* is laid, then it is necessary to lay the *venue* under a *videlicet*. The *videlicet* was in fact introduced in the declaration, in stating the place, for the purpose of

avoiding a difficulty, which was otherwise supposed to exist under the ancient law, that the jury to try the cause must be summoned from the vincinage or *venue* laid in the declaration. Stephens on Plead. 310; 1 Sellon's Pr. 245; *Roberts v. Harnage*, Salk. 659; S. C. 2 Ld. Ray. 1043; 1 Com. Dig. 255, Action N. 7; *Kearney v. King*, 2 Barn. & Ald. 301; *Mostyn v. Fabrigas*, Cowper, 178-9.

If the place stated in this declaration, "to wit, Newark, in the county of Essex," was designated as the place where the judgment was rendered, the place alleged is intrinsically impossible and inconsistent with the fact to which it relates for no judgment of the Supreme Court of New York could be rendered there. And if the place be material, the plaintiff must fail upon the trial, notwithstanding the use of the *videlicet*. For a variance in the statement of a material fact is not aided by its being laid under a *videlicet*. The averment is nevertheless regarded as positive, direct, and traversible. 1 Chit. Pl. (7th Ed.), 348, 644; 2 Saund. R. 200, a. note 1.

If, on the other hand, the place alleged in the declaration was designed as a mere designation of the *venue* (as seems to have been the case, from its being laid, under a *videlicet*) then no place is stated in the declaration where the judgment was rendered. It is insisted, in support of the demurrer, that this is necessary, and that it is not consistent with good pleading, in counting on a judgment, to omit a statement of the place where the court was held. The practice is certainly so. The numerous precedents in the books invariably contain a statement of the place where the court was held before whom the judgment was recovered; and the practice prevails, as well in declaring upon the judgments of the superior courts of Westminster hall, as upon the judgments of inferior courts of limited jurisdiction. And when the judgment is not in the same court, or within the county where the *venue* is laid, the practice is to allege that the judgment was rendered by the court of — holden at Westminster, to wit, at A, in the county of B. 7 Went. Pl. 95, 79 to 119; 2 Chit. Pl. (7th Ed.) 482 to 493.

In pleading a record of the superior courts at Westminster, it is not necessary to state the county in which the court is holden. It is sufficient to state it to be at Westminster. Arch. Civ. Pl. 117.

The precedents show clearly that the practice is not founded on the idea that an action upon a judgment is a local action. It prevails as well in declaring upon foreign, as upon domestic judgments, and upon the judgments of the superior courts at Westminster, as upon the judgments of inferior courts of limited jurisdiction. A practice or form of pleading, uniform and long established, if it be but a matter of form, involving no higher principle, should, for the sake of certainty and uniformity, be adopted, and not deviated from without good cause. 1 Chit. Pl. (7th Ed.) 266.

But the practice is founded in reason and propriety, which is very apparent in its application to the supreme courts of other States. They have not uniformly one fixed and invariable place of meeting, as the courts at Westminster have. In some of the States, the Supreme Court sits in districts designated by law, with separate places of record and a prothonotary or clerk in each district. The jurisdiction of the court within those districts may, to some extent at least, be limited. This court certainly cannot judicially know that the Supreme Court of any other State has general jurisdiction throughout the State, and that its place of sitting is fixed by law and determinate. When a court sits in different places for different districts, and where the territorial jurisdiction of the court varies with the place in which its sitting is held, the propriety and necessity (in declaring upon a judgment of such court) of stating definitely the place where the court was held when the judgment was rendered is sufficiently obvious. In that mode only would the defendant be informed by the declaration of the real cause of action, and enabled to avail himself of every legitimate defense.

*There must be judgment for the demurrer.*⁸¹

81. At common law it was customary to lay a venue in the margin for the purpose of indicating the place of trial, and, in addition, to lay a venue in the body of the declaration as to every material allegation. Stephen says that the latter became an unmeaning form, the venue in the margin being entirely sufficient for all practical purposes. (Steph. Pl. 280.) And there is American authority for this view of the uselessness of a venue in the body of the declaration. *Reed v. Wilson* (1879) 41 N. J. L. 31. But there is also good authority in favor of a practice which gives convenient certainty as to place, even though it be not traversable. See *Bean v. Ayers* (1878) 67 Me. 432.

(c) Names and Identity of Parties.

ELBERSON v. RICHARDS.

*Supreme Court of New Jersey. 1880.**42 New Jersey Law, 69.*

SCUDDER, J.: In an action by foreign attachment in the court for the trial of small causes, the defendant was described in the affidavit, writ of attachment, state of demand, and judgment, as Mrs. J. W. Elbertson. Her correct name is Rebecca Louisa Elbertson, and she is, and was at the time of the suit, the wife of Joseph W. Elbertson. The names Elbertson and Elbertson are so near alike that they may be considered *idem sonans*, and the difference is so little that no prejudice could come to the defendant below by the slight change of name. The addition and suppression of the "t" or other consonant in surnames ending with "son," is quite common, and is not a material variance in pleading, though it is sometimes so estimated in families. The second objection is more material. Neither Mrs. nor J. W. are proper Christian names. The former only distinguishes the person named as a married woman, while J. W. are but initials, and no name.

It must be stated, with certainty, who are the parties to the suit, and actions, to be properly brought, must be commenced and prosecuted in the proper Christian and surnames of the parties. 1 Chit. Pl. 256; *Frank v. Levie*, 5 Rob. 600.

The exception is found in the statute 3 and 4 *William IV.*, c. 42, § 12, which has been adopted in our state (*Practice Act*, Rev., p. 853, § 28), and this enacts, in all actions upon bills of exchange, promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient to designate the person by the same initial letter, letters or contraction, instead of stating the Christian name or names in full. This case, in attachment for a store book account, is not within the exception.

In *Miller v. Hay*, 3 Exch. 14, the defendant was described as W. D. Hay, and there was a special demurrer, assigning

for causes that the defendant's name was not properly stated, as he was described only by his surname and two initials, without any excuse for his full Christian names not being inserted, and without any allegation to show that he had no Christian name or names, or that he was described by initials, or had so described himself in the bill of exchange in the declaration mentioned. It was held to be an insufficient designation of the defendant, and bad on the face of the declaration.

* * * * *

To the like effect are some cases in our courts. *Clayton v. Tonkin*, 4 Halst. 252; *Seely v. Schenck*, Penn. 75; *Wood v. Fithian*, 4 Zab. 838.

There is no relaxation or change of this rule of description, in proceedings on attachment. In Locke on Attachment, p. 5, it is said that the Christian and surname of the debtor and creditor shall be stated.

* * * * *

TURVIL v. AYNSWORTH.

Court of King's Bench. 1727.

2 Lord Raymond, 1515.

The defendant gave the plaintiff a note under his hand, viz., London, 31 May, 1720, I promise to accept of Mr. George Turvil or his assigns 800*l.* South Sea stock on the 31st May, 1721, and pay him or his assigns 5600*l.* for the same, witness my hand Steven Aynsworth. The plaintiff gave the defendant the like note, promising to transfer, etc. And in an action brought upon this promise, the plaintiff declared, that the defendant in consideration that the plaintiff had promised to transfer to the defendant upon the 31st of May, 1721, 800*l.* *in capitali fundo gubernatoris et societatis mercatorum Magnae Britanniae negotiantium ad maria Austrialia et alia loca Americae et pro incitatione piscationis, Anglice vocato* South Sea stock, promised to accept it, and pay 5600*l.*, etc. Upon *non assumpsit* pleaded, the cause came to be tried before me last Trinity term at Guildhall; and upon the trial the defendant's coun-

sel took several exceptions. * * * 3. That the plaintiff had mistook the name of the South Sea Company for there was no such word as *Austrialia* for South but the proper Latin word was *Australia*. Whereupon it was agreed, the plaintiff should have a verdict, with liberty for the defendant to move for a new trial, if the Court of King's Bench should be with him in any of his exceptions. * * * But then as to the third exception, it being moved in the King's Bench and argued by counsel on both sides, the Court was unanimous of opinion, that the plaintiff had failed in proving his declaration; for the evidence being of a promise to accept South Sea stock, and the name of the corporation being set out with an insensible and improper word, viz., *Austrial* 'instead of *Austral*' did not describe that corporation, and by consequence the agreement set out in the declaration was to transfer a different stock from that which was proved by the evidence. And they held, that if the word '*Austrial*' was rejected, as the counsel for the plaintiff would have it, that would not help the plaintiff; for then the corporation described would be, the Governor and Company of Merchants trading to the seas and other places in America, etc., but would not be that corporation, part of whose stock was proved to be agreed to be transferred, and the verdict was set aside, and a new trial granted, February the 7th, 1727.

POLLARD v. LOCK.

Court of Queen's Bench. 1592.

Croke's Elizabeth, 267.

Information upon the 5 Eliz., c. 9, for perjury. And declares that whereas J. R. brought trespass against him, and he pleaded not guilty, and the plaintiff intitled himself by a feoffment of the land, he shewed a court roll held before J. Locke, gent. which proved it was copyhold; *praedict' J. Locke falso' deposuit*, "that he was not steward at that time," *ubi revera* he was then steward, whereby the verdict passed against him, etc. After verdict, it was alleged in arrest of judgment, that the declaration is in-

sufficient, for here are two J. Lockes mentioned, viz., the defendant, and J. Locke steward, and so may be intended another man: and when it is said *praedict' J. Locke deposuit*, this shall be intended to refer to him that was last named, and not to the defendant; and every declaration ought to be certain, and shall not be taken by intendment. And for this cause it was adjudgment for the defendant. *Vide* 10 Hen. 7 pl. 5 B. 5 Hen. 5. pl. 8. 6 Edw. D. 70. 21 Hen. 7. 30 B.

BECKER v. GERMAN MUTUAL FIRE INSURANCE COMPANY.

Supreme Court of Illinois. 1873.

68 Illinois, 412.

PER CURIAM: This was an action of *assumpsit* upon a premium note, alleged in the declaration to have been executed by William Becker to the insurance company. The company recovered, and the defendant appealed.

On the trial in the court below, the plaintiff offered in evidence a note signed by Wilhelm Becker. The defendant objected to the introduction of the note in evidence, on the ground of a variance as to the name of the maker. The court overruled the objection and admitted the note in evidence. This is assigned as error.

This court has repeatedly held that, in actions upon instruments of writing, where the alleged name of a party thereto is apparently different from the one appearing to the instrument when offered in evidence, the instrument would be inadmissible in evidence, and should be rejected on the ground of variance, unless there be an averment in the declaration explaining the apparent inconsistency between the names, and the averment be sustained by proof; that, to justify a finding for the plaintiff, the description of the writing as to name in the declaration, and the instrument offered in support of it, should correspond and be consistent the one with the other; that it is immaterial, as to the obligation of the promise, by what name the defendant executed the writing; that he may be sued upon it by

his true name, and any apparent variance or inconsistency between the instrument and the name of the alleged maker, by reason of the name in fact used, may be helped or *prima facie* avoided by an averment in the declaration that the maker executed the written promise by such name, or otherwise reconciling the apparent inconsistency. *Hurd et al v. Culies et al.*, 18 Ill. 188; *Rives v. Marrs*, 25 id. 315; *Curtis v. Marrs*, 29 id. 508; *Graves v. People*, 11 id. 542; *Garrison v. People*, 21 id. 535; *O'Brien v. People*, 41 id. 456.

There is here a difference in the orthography and sound of the names. We cannot hold them to be the same, unless it be so made to appear by averment and proof.

* * * * *

For error in this respect, the judgment is reversed and the cause remanded.

*Judgment reversed.*⁸²

82. In *Commonwealth v. Shearman* (1853) 11 Cush. (Mass.) 546, it was held that George Allen and George E. Allen could not be deemed to be one and the same person without proof of identity.

(d) *Title.*

KEITH v. PRATT.

Supreme Court of Arkansas. 1844.

5 Arkansas, 661.

Debt in the Crawford Circuit Court, determined in October, 1843, before the Hon. R. C. S. BROWN, one of the circuit judges. Pratt sued Keith. The declaration was, "John G. Pratt, surviving partner of E. Y. Baker, by attorney, complains of Nathan Keith to answer the plaintiff in an action of debt, and the plaintiff demands of the defendant the sum of \$482.48, which he owes to and unjustly detains from him. For that whereas the defendant, on the 2d December, A. D. 1840, made his certain promissory note in writing and delivered the same to the plaintiff, and now, here to the court shown, and thereby promised to pay, on demand, to Edward Y. Baker & Co., or order, \$482.48, which period hath now elapsed, and by reason of the said

sum of \$482.48 being unpaid, and by reason of a demand for payment having been made by the plaintiff, an action hath accrued to the plaintiff to demand of the defendant the said sum of \$482.48, being the said sum above demanded, yet the said defendant has not paid the said sum above demanded or any part thereof to the plaintiff, 'damage of one hundred dollars, and therefore brings his suit.'"

* * * There was a demurrer to the declaration, because
 * * * the declaration contains no averment of the plaintiff's right to sue: * * *

By the Court, SEBASTIAN, J.: The facts being admitted by the demurrer as stated in the declaration, does the plaintiff show himself entitled to recover? The general principle in pleading is, that the declaration must set forth a title in the plaintiffs to the thing sued for; and if no title is shown, the defect is fatal at every stage of the proceeding. The plaintiff declares as "surviving partner of E. Y. Baker" and the promissory note is payable to Edward Y. Baker & Co. There is no averment of the identity of the payees with the plaintiff and his deceased partner, and this connection is necessary to establish the legal title by survivorship in the plaintiff. This should be positively and directly averred and not left to inference. The facts may all be true, and yet the plaintiff have no cause of action. Upon this ground the court erred in overruling the demurrer.

* * * * *

CLAY v. CITY OF ST. ALBANS.

Supreme Court of Appeals of West Virginia. 1897.

43 West Virginia, 539.

BANNON, J.: This was an action of trespass on the case by M. C. Clay and Amanda Clay, his wife, against the city of St. Albans, to recover damages for injury caused by the flow of surface water upon a lot occupied by them resulting in judgment against the city, which sued out this writ of error.

The declaration is attacked on demurrer because it fails to plead the title of the plaintiffs—not showing whether they

claim in fee, or for life or years, in present or future estate. It is plain that a declaration must have a legal certainty in all material elements. It must tell wherein and how the plaintiff has been injured; if in property, it must tell what property right has been invaded. This is but the common, basic rule of the law of pleading applicable to declarations and other pleadings, "that pleadings must show title,"—not title in the common-speech meaning (that is, deeds or other muniments of title), but their results; the right flowing from them; the right, estate, or property interest wherein party has been harmed. "When, in pleading, any right or authority is set up in respect of property, personal or real, some title to that property must, of course, be alleged in the party, or in some other person from whom he derives his authority. So, if a party be charged with any liability in respect to property, his title to that property must be alleged." Steph. Pl. 286; 4 Minor, Inst. 1182. But how is the title to be pleaded? This is a practical question, often of perplexity. Counsel claim that this declaration should say whether the estate is in fee, for life, for years, in remainder or reversion, as the case may be; but I do not think so, for it is well settled that, where there is an injury to a present estate in real or personal property, an allegation of possession by the plaintiff is a sufficient pleading of title; and it will do to allege that personal property was "the goods and chattels of the plaintiff," or that he was "lawfully possessed of certain goods and chattels, that is to say" (specifying them); and in case of realty it will answer to say that the land was "the close of the plaintiff," or that "he was lawfully possessed of a certain close" or "a certain tract of land" (specifying it). Steph. Pl. 286; *McDodrill v. Lumber Co.*, 40 W. Va. 564, 21 S. E. 878. Standard forms show this. Under such statement of title any kind of right or estate in possession, fee simple, for life, or for years, may be shown, but not a future estate, in other words, that mode of statement imports an immediate estate or property. This must be so, because one in possession has some kind of immediate estate in present enjoyment, and possession is an element of title, and *prima facie* evidence of good title to some kind of estate, and possession alone will support trespass. If the estate injured is a remainder or reversion, though vested, yet not vested in actual possession, you must allege such estate in

proper manner. In some cases it is necessary to set out the derivation of title and the estate, as in certain pleas; but generally not in declarations, and not in those for injury to property. Now, test this declaration by these principles. It avers that Amanda Clay was "seised, and, together with the plaintiff M. C. Clay, her husband, has been during all that time, and still is, possessed, of a lot of land." Here is an averment of possession, and, though it does not say of what estate they were seised and possessed, yet it imports some immediate, present estate, not a future one, and is good, under the doctrine above given. Possession alone is sufficient to maintain trespass or case against a wrong-doer. Step. Pl. 287; *Wilson v. Manufacturing Co.*, 40 W. Va. 413, 21 S. E. 1035.⁸³

* * * * *

83. *When a possessory title is not enough to establish a right, a superior title must then be shown, and the rule is that this must be alleged in its full and precise extent.* Under this general rule there are the following particular rules:

1. Seizin in fee simple may be alleged *per se*, and need not be derived.
2. Where seizin has already been alleged in another, the pleader must show the derivation from that other; as where the heir of a lessor sues on a covenant in the indenture of lease, he must, after alleging that his ancestor was seized in fee and made the lease, show how the fee passed to himself, viz., by descent.
3. Where a particular estate is relied upon, as an estate tail, for life or for years, it must be derived from the last seizin in fee simple, subject to the exception that when such particular estate is alleged by way of inducement only, no derivation is necessary.
4. When a party undertakes to derive his title he must, if he claims by inheritance, show how he is heir, or if he claims by conveyance he must show the nature of the conveyance, as by devise, feoffment, etc.
5. Where defendant claims title to the *locus in quo* in *trespass quare clausum* or in an avowry in replevin, a general freehold title is sufficient to be alleged, called a plea or avowry of *liberum tenementum*. Stephan on Pleading (Tyler's Ed.) 286-296.

HIGGINS v. FARNSWORTH.

Supreme Court of Vermont. 1875.

48 Vermont, 512.

The opinion of the court was delivered by

WHEELER, J.: The plaintiff in her declaration has set forth that she was "possessed of a certain way and right of way" appurtenant to her premises, that the defendant

has obstructed it "and has thereby hindered and prevented the plaintiff from the use of said way, by reason whereof she has suffered great inconvenience and damage, and by means thereof" her premises "have been greatly injured and rendered less fit for occupation." This is, clearly, a declaration for an injury to a right of way in possession, and not to one in reversion. Her evidence at the trial showed that during the whole time covered by the declaration, the premises were in the occupation of one Hodgman under leases of a year each, made from year to year, and that she had no occupancy of them during that time. The way, being appurtenant to the premises, would, while Hodgman so occupied them, belong to him and not to the plaintiff, and an obstruction of it during that time would be an injury to his right and not to any right of hers, unless it should be of such a permanent nature as to affect the value of her right to the inheritance in reversion. The right of Hodgman to damages for an obstruction during his term, is wholly distinct from hers for an injury to her right as reversioner, although the same act might cause both. This appears from *Jeffer v. Gifford*, 4 Burr. 2141, where it was moved in arrest of judgment in an action for obstructing ancient lights, for that the interest of the plaintiff was stated to be that of a reversioner only, and if he should recover, the tenant might also, and the defendant be subjected to double damages; but the court held that the rights of the tenant and reversioner were separate, and that each should recover for any injury to his own. Also from *Tinsman v. Belvidere & Del. R. R. Co.*, 1 Dutch. 255, where one count that set forth a reversionary right in the plaintiff and an injury only to the possessory right of the tenants, was held bad. In an action for an injury to a reversionary right, an interest in that right, or one large enough to include an interest in it, belonging to the plaintiff, and an injury sufficiently permanent to affect it, must be set forth. 1 Saund. Pl. and Ev. 295; 2 Chit. Pl. 777, note. In *Cushing v. Adams*, 18 Pick. 110, the action was for an injury to a right similar to this, in possession, and the evidence showed the premises and way to be in possession of a tenant at will merely. The court recognized the doctrine that a reversioner could not maintain an action for an injury to the right in possession, but held that the possession of such a tenant was the possession of the landlord,

and on that ground the action was sustained. If the plaintiff's evidence in this case could be held to show that she had to some extent received an injury to her reversionary right, she has no declaration for that proof to support; and the evidence did show that she had not the possessory right, for an injury to which she had declared; so that, taken all together, it appeared that she was not entitled to maintain the action she had bought, and the judgment of the county court was correct.

Judgment affirmed.

BRISTOW v. WRIGHT.

Court of King's Bench. 1781.

2 Douglas, 665.

In last Hilary term, on Thursday, the 25th of January, Lee obtained a rule to shew cause, why the verdict which had been found for the plaintiff should not be set aside, and a new trial granted, or a nonsuit entered.

This was an action on the case, against the defendants as sheriff of *Middlesex*, on the statute of 8 Ann., c. 14, § 1 for taking the goods of one Pope in execution, in a house let from year to year by the plaintiff to Pope, without paying or contenting him for a year's rent then due, and of which the defendants, before the removal of the goods, had notice.

The declaration stated the demise as follows:

"The plaintiff, on etc., demised, to one Benjamin Pope, a certain messuage, etc., to have and to hold unto the said Benjamin, from the feast of St. Michael, then next following, for and during the term of one year from thence next ensuing, and fully to be complete and ended, and so, from year to year, for so long as it should please the plaintiff, and the said Benjamin, yielding and paying, therefore, yearly and every year during the said term unto the plaintiff, the yearly rent or sum, etc., by *four even and quarterly payments; to wit, at the Feast of, etc.*"

The principal witness called on the part of the plaintiff, was Pope himself; who proved, that the plaintiff let

the house to him, by parol, for a year, and *that there was no stipulation about any time or times for the payment of the rent.*

It was contended, at the trial (which came on before Lord MANSFIELD, at the Sittings for Middlesex), that, as the plaintiff had laid a demise with a reservation of rent *payable quarterly*, he was bound to prove it exactly as laid; and that, having failed in that proof, he ought to be nonsuited. His Lordship overruled the objection, being then of opinion, that enough of the demise as laid had been proved to entitle the plaintiff to his action. The present rule was moved for, on the ground of misdirection.

* * * * *

Lord MANSFIELD (after stating the case): I am very free to own, that the strong bias of my mind has always leaned to prevent the manifest justice of a cause from being defeated or delayed by formal slips, which arise from the inadvertence of gentlemen of the profession; because it is extremely hard on the party to be turned round, and put to expense, from such mistakes of the counsel or attorney he employs. It is hard also on the profession. It was on this ground that I overruled the objection in this case; but I am since convinced, both on the authorities which I am about to mention, and, on the reasoning in them, that I was wrong, and that it is better, for the sake of justice, that the strict rule should in this case prevail. I have always thought, and often said, that the rules of pleading are founded in good sense. Their objects are precision and brevity. Nothing is more desirable for the court than precision, nor for the parties than brevity. It is easy for a party to state his ground of action. If it is founded on a deed, he need not set forth more than that part which is necessary to entitle him to recover. If he states what is impertinent, it is an injury to the other party, and may be struck out, and costs allowed, upon motion. I remember a case, where, in an action on one covenant, the whole of a very long deed was set forth. The court referred it to the Master, and all was struck out except the covenant on which the action was brought, and costs paid to the amount of 100*l*. When I say that the plaintiff need only set forth that part of a deed on which his action is founded, I do not mean to say that even *that* is necessary. He is not bound to set forth the material parts, *letters and words*. It would be sufficient to

state *the substance and legal effect*. That is shorter, and not liable to misrecitals, and literal mistakes. Here, that method might have been followed. It certainly was not necessary to allege this part of the lease that relates to the time of payment, in order to maintain the action. But, since it has been alleged, it was necessary to prove it. The distinction is between that which may be rejected as surplusage (which might have been struck out on motion), and what cannot. Where the declaration contains impertinent matter, foreign to the cause, and which the Master, on a reference to him, would strike out (irrelevant covenants for instance), that will be rejected by the court, and need not be proved. But, if the very ground of the action is misstated, as where you undertake to recite that part of a deed on which the action is founded, and it is misrecited, that will be fatal. For then, the case declared on is different from that which is proved, and you must recover *secundum allegata et probata*. This will reconcile all the cases. In the present instance, the plaintiff undertakes to state the lease, and states it falsely. There are many authorities which go to prove this distinction. I will mention three (which are very strong) where matter, which it was unnecessary to set forth, being stated, and not proved, the variance was held to be fatal. The first is the case of *Cudlip v. Rundle*, Carth. 202. There, in an action by a lessor against his tenant, for negligently keeping his fire, by means whereof the house was consumed, a demise to the defendant for seven years was stated in the declaration; the defendant pleaded that the plaintiff did not demise *modo et forma*; and issue being joined, it appeared, on the finding by the jury in a special verdict, to be a lease at will. The court agreed, that the action would have lain against the defendant as tenant at will; but, as the plaintiff had stated him to be a lessee for years, and proved him tenant at will, the variance was held fatal, and there was judgment for the defendant. The next is the case of *Savage, qui tam v. Smith*, in the common pleas, 2 Blackst. 1101. That was an action of debt against a sheriff's officers, by an informer. The declaration stated a judgment, and *fieri facias* upon that judgment. The *fieri facias* was given in evidence, but not the judgment, and the court held, that, though it might be unnecessary to aver the judgment, yet, having been averred, it ought to be proved; and my Lord Chief Justice

DE GREY, expressly went upon the distinction between immaterial and impertinent averments, and said that the former must be proved, because relative to the point in question. The third case is *Shute v. Hornsey* in this court, E. 19 Geo. 3. That was an action for double rent on the statute. The declaration stated a lease for three years; but, on the evidence, it appeared that the lease for three years was void under the statute of frauds; and that the defendant was only tenant from year to year. This was sufficient for the purpose of the action; but a lease for three years having been laid, and not proved, the plaintiff was nonsuited; and a rule for setting aside the nonsuit having been obtained, it was, upon the argument of the case, discharged. These authorities are in point to the doctrine I have laid down. But perhaps, notwithstanding the weight of the cases, if that doctrine were highly detrimental, and the setting it right would be attended with no mischief, as it is only a mode of practice, it might deserve consideration. But I believe it stands right, and upon the best footing; for it may prevent the stuffing of the declaration with prolix unnecessary matter, because of the danger of failing in the proof; and it may lead pleaders to confine themselves to state the legal effect. We are all of opinion that the verdict should be set aside, and judgment of nonsuit entered.

Rule made absolute.

RIDER v. SMITH.

Court of King's Bench. 1790.

3 Term Reports, 766.

This was an action on the case for not repairing a private road leading through the defendant's ground. The declaration stated that the plaintiff on, etc., and long before, was and from thence hitherto hath been and still is possessed of a certain messuage, etc., and by reason of his possession thereof was entitled to a certain way from the said messuage unto, into, through and over a certain close of the defendant, etc., unto and into the King's common

highway, etc., and so back again, etc., from the said King's common highway unto, into, etc., to go, pass, and repass,, etc., that the defendant now is and during all the time aforesaid hath been lawfully possessed of and in the said close called, etc., and of and in divers, to wit, two other closes of land in the parish of Manchester aforesaid, with the appurtenances, contiguous and next adjoining to the said close, etc., to wit, etc. And that the defendant, by reason of his possession of the said close called, etc., and the said two closes of land with the appurtenances, contiguous and next adjoining thereto, during all the time aforesaid of right ought to have maintained and repaired and still ought to maintain and repair at his own proper costs and charges, when and so often as the same hath been necessary, the said way leading, etc., yet that he had wrongfully and injuriously permitted it to be ruinous and out of repair, etc., *per quod*, etc.

To this declaration there was a general demurrer, and joinder in demurrer.

* * * * *

BULLER, J., said the distinction was between cases where the plaintiff lays a charge upon the right of the defendant, and where the defendant himself prescribes in right of his own estate. In the former case, the plaintiff is presumed to be ignorant of the defendant's estate, and cannot therefore plead it; but in the latter the defendant, knowing his own estate in right of which he claims a privilege, must set it forth. In *R. v. Sir J. Bucknall*, 2 Ld. Raym. 804, Lord HOLT said, "Where a man is obliged to make fences against another, it is enough to say *omnes occupatores* ought to repair, etc., because that lays a charge upon the right of another, which it may be he cannot particularly know." And notwithstanding two out of the three of the judges were of a different opinion in *Holback v. Warner*, Cro. Jac. 665, yet several subsequent cases have been determined on the above distinction. In 1 Vent. 264, there is the report of an action on the case against the defendant for not repairing a fence, where the allegation was that the tenants and occupiers of such a parcel of land adjoining the plaintiff's have time out of mind maintained it, etc.; Holt moved in arrest of judgment, "That the prescription is laid in occupiers, and not shewn their estates; and that hath been judged naught in 1 Cro. 155, and 2 Cro. 665." But the

court said, "It is true there have been opinions both ways; but 'tis good thus laid, for the plaintiff is a stranger and presumed ignorant of the estate; but otherwise it is if the defendant had prescribed." So in *Tenant v. Goldwin*, Salk. 360, in an action on the case for not repairing a wall "*debutit reparare*" was held sufficient. The case of *Winford v. Wollaston*, 3 Lev. 266, is also to the same effect.

Judgment for the plaintiff.

STANLEY v. CHAPPELL.

Supreme Court of New York. 1828.

8 Cowen, 235.

On demurrer to the declaration. This was in debt on an award. It began thus: "Elijah Stanley, as guardian and security for Amanda Stanley, Dyer Stanley, etc., heirs at law of Dyer Stanley, deceased, plaintiff in this suit, complains," etc. * * * After the commencement, the declaration described him as *plaintiff* simply. * * *

* * * * *

Curia, per SUTHERLAND, J.: The first ground of objection to the declaration, appears to be fatal. The plaintiff describes himself as guardian and security for Amanda Stanley, and others; but does not show how he is guardian and security, or that he was specially appointed by the court, or that those for whom he assumes to act, are infants. In 2 Saund. 117, f. note (1), it is expressly laid down, that if an infant sues by guardian or *prochein amy*, without saying, by the court here specially admitted, it is error. He is supported by the case of *Combers v. Waton*, 1 Lev. 224; and in *Rawlin's case*, 4 Rep. 53, 4, it was held that the admission of the guardian or *prochein amy* not being entered of record, is not material, if the appointment be in fact made, and so averred or stated in the declaration. (And see, Com. Dig. Plead. (2 C. 1.) 3 Mod. 236, 1 R. L. 416, 1 Dunl. Pr. 86, 7 et seq., Tidd's Pr. 69, 70, 71, 2 Archb. Pr. 143, 4.) If the omission be error, it is fatal on demurrer.

CUMMINGS v. EDMUNSON.

*Supreme Court of Alabama. 1837.**5 Porter, 145.*

Waddy Edmunson, administrator of all and singular the goods, chattels and credits, which were of William Edmunson, Jr., deceased, at the time of his death, left unadministered by Samuel Dean, administrator in right of his wife, Parthena Dean, formerly Parthena Edmunson, wife of the said William Edmunson, Jr., deceased, and administratrix, etc., declared against Thomas Cummings in an action of debt—for that whereas, the said defendant, theretofore, to wit. * * * And the declaration closed in common form, with a profert of letters of administration.

* * * * *

GOLDTHWAITE, J.: It is urged against the declaration, that no averment of the death of the administrator in chief, is to be found in any part of it, and the inference is drawn, that no title to sue is shewn by the plaintiff. We find on examination that no statement of the death of the administratrix in chief is contained in the declaration, nor does it in any wise appear, that she was removed from the administration in the estate of the intestate.

The plaintiff in the cause below, can only be entitled to sue on the claim which is the foundation of this suit, by virtue of his representative character, and we are unable to perceive any distinction, so far as the necessity of allegation exists, between his and any other case of a derivative title. An executor or administrator, must show in pleading the death of the testator or intestate, although it may not be necessary to prove it on the general issue; a surviving copartner must set out the death of his partner; a joint obligor, who sues alone, must set out the death of his co-obligors—and in the case we are now considering, we cannot perceive why the same reason does not prevail, when the suit is by an administrator *de bonis non*. He claims title under the administration, and if the administrator in chief be not dead, he can have no title, whatever. He may be termed an assignee by operation of law, and there can be no good reason urged, why he should not be obliged to state

the sole fact from which his authority as administrator *de bonis non*, is to be derived.

We have not been able to ascertain if this question has ever before been presented to any court, but all the precedents sustain the principles we have laid down, and we have no reason to doubt the justice of their application to this particular case.

BANK OF HUNTINGTON v. HYSELL.

Supreme Court of Appeals of West Virginia. 1883.

22 West Virginia, 142.

GREEN, J.: * * * The declaration simply states, that the defendant, M. L. Hysell, executed her note to the defendant, A. G. White, for two hundred and fifty dollars payable ninety days after its date at the Bank of Huntington, and that this note was endorsed by the defendant, A. G. White. * * *

This declaration does not state, that the plaintiffs have any interest of any sort in this note. It is true it does state, that it was endorsed by the payee, A. G. White, but who was the endorsee, it does not state. It fails entirely to state, as it should have done, that the said payee, A. G. White, thereby "ordered and appointed the said sum of money in the said note specified to be paid to the plaintiffs." * * * It is true, as claimed by the counsel for the plaintiffs in error, that the mere possession of a negotiable instrument payable to the order of the payee and indorsed by him in blank, is in itself sufficient evidence of his right to present it and to demand payment thereof and bring suit thereof if it be not paid. See *Shed v. Brett*, 1 Pick. 401; *Seaver v. Lincoln*, 21 Pick. 267. But though this be the rule of evidence, yet it in no manner modifies the rule of pleading, which requires the plaintiff in all cases to show title. Had the plaintiffs alleged title, they could under the rule, which we have stated, have proved their title by the simple production of the note sued upon endorsed in blank by the payee. But the fact, that title might be thus proven, cannot dispense with the absolute necessity imposed by the rules

of pleading upon the plaintiffs to allege title in themselves, which they wholly failed to do in the declaration in this case.⁸⁴

* * * * *

84. In case of a blank indorsement the holder may either declare upon the note as indorsed to himself by the payee, or he may allege the indorsement in blank and that he is the owner and holder of the paper.—14 Encyc. Pl. & Pr. 524.

“When a note has passed through several successive transferees it is held that the plaintiff may ignore all intermediate transfers not necessary to his title, and allege a transfer by the payee directly to himself or to his immediate indorser. But if the plaintiff undertakes to trace his title through intermediate indorsers, it is not sufficient to prove merely an indorsement of the defendant, but he must also show the subsequent indorsement as alleged.”—14 Encyc. Pl. & Pr. 523.

KEELER v. CAMPBELL.

Supreme Court of Illinois. 1860.

24 Illinois, 287.

WALKER, J.: This was an action of *assumpsit*, instituted in the court below, on an assigned note. The declaration contained a special count on the note, and the common counts. To the special count a demurrer was interposed, and the general issue was pleaded to the common counts. The court overruled the demurrer and defaulted the defendants, and assessed the damages, and rendered judgment therefor, without in any way disposing of the issue on the common counts. To reverse this judgment defendant prosecutes this writ of error.

The objection urged upon demurrer to the special count, is that it only contains the simple averment that the note described in that count, was assigned and delivered to the plaintiff. It is only by force of the statute that the legal title to promissory notes can be assigned, and in doing so, it is essential that its substantial requirements should be complied with, to have that effect. The statute provides, that such instruments shall be assignable by indorsement thereon, under the hand or hands of the payee, and of his assignees in the same manner that bills of exchange are, so as absolutely to transfer the property thereof, in each and every assignee successively. By the provisions of this

enactment, the legal title to such an instrument, can only be transferred to the assignee, by an indorsement on the note itself, under the hand of the person having the legal title. There is in this count no such averment. If the assignment had been made in writing on a separate piece of paper, or even orally with its delivery, this averment would have been proved. Such a transfer would have passed the equitable title, and yet the holder would have had no right to maintain an action in his own name. The declaration should have contained an averment that the indorsement was made on the note in accordance with the requirements of the statute, and failing in this, the demurrer was well taken, and the court below erred in overruling it.

* * * * *

Judgment reversed.

(e) *Authority.*

BARKER v. BRAHAM.

Court of Common Pleas. 1773.

3 Wilson, 368.

[The defendant Braham, by her attorney Norwood, procured the arrest of the plaintiff on a *capias ad satisfaciendum*, upon a judgment which did not authorize an arrest. Whereupon the plaintiff brought an action of trespass *vi et armis* against both Braham and Norwood. Plea, not guilty.]*

Sergeant *Burland*, for the plaintiff. * * * It must be taken that he [Norwood] has acted without the authority or process of the court, because he has not pleaded it; he did not plead it, because if he had pleaded it he must have set forth the judgment in his plea, and then it would have appeared clearly to the court that he had done wrong.

* * * * *

Lord Chief Justice DE GREY. * * *

A sheriff, or his officers, or any acting under his or their authority, may justify themselves by pleading the writ only, because that is sufficient for their excuse, although there be no judgment or record to support or warrant such writ; but if a stranger interposes and sets the sheriff to do an execution, he must take care to find a record that warrants the writ, and must plead it; so must the party himself at whose suit such an execution is made. No trespass can be excused but what is inevitable; see the case of *Parsons v. Lloyd*, adjudged in the last term, ante, 341.

Mr. Norwood has pleaded not guilty; he could not justify by a special plea, because there is no record to warrant a *capias ad satisfaciendum* against Mrs. Barker.

• • • • •

WASSON v. CANFIELD.

Supreme Court of Indiana. 1845.

6 Blackford, 406.

BLACKFORD, J.: This was an action of trespass for an assault and false imprisonment, brought by William C. Canfield against Richard Wasson, James Robb and William Madden. After the filing of the declaration, the death of Madden was suggested, and the cause was ordered to proceed against the other defendants. Wasson pleaded the general issue and two special pleas. The first special plea is to the following effect: That at the time of the trespass, etc., the defendant was a justice of the peace, etc., that a felony had been committed, etc., by certain persons making, forging, and counterfeiting, etc. (the particulars of the offense are here set out), that on, etc., a reasonable suspicion and belief existed that the plaintiff was guilty of said felony, and there was reasonable ground for such suspicion and belief; that thereupon, afterwards, etc., the defendant being a justice of the peace as aforesaid, by reason of such felony having been committed as aforesaid, by reason of reasonable suspicion and belief that the plaintiff

was guilty of such felony, and of such reasonably ground of suspicion and belief that the plaintiff was so guilty, commanded said Robb to arrest the plaintiff and take him before some justice of the peace, etc.; that Robb, in pursuance of said command, gently laid his hands on the plaintiff, and took him before one John J. Cross, a justice of the peace, etc. The second special plea is similar to the first, except that it does not allege that the defendant was a justice of the peace.

Robb also pleaded the general issue and two special pleas. The first of his special pleas was to the following effect: That at the time of the trespass, etc., he was a constable, etc.; that a felony had been committed, etc., by certain persons making, forging, and counterfeiting, etc., (the particulars of the offense are here set out); that afterwards, etc., a reasonable suspicion and belief existed that the plaintiff was guilty of said felony, and there was reasonable ground for such suspicion and belief; that one Richard Wasson and others charged the plaintiff with being guilty of said felony, and informed this defendant, he being a constable, etc., that the plaintiff was guilty; that afterwards, etc., this defendant, constable aforesaid by reason of said felony having been committed as aforesaid, and of such reasonable suspicion and belief that the plaintiff was guilty thereof, and of reasonable ground for such suspicion and belief, and of said charge and information of said Wasson and others, for the purpose of carrying the plaintiff before some justice of the peace to be dealt with, etc., gently laid his hands on the plaintiff and took him before one John J. Cross, a justice of the peace, etc., to be dealt with, etc.; which is the same trespass, etc. The second special plea of this defendant is similar to the first, except that it does not allege that he was a constable.

The special pleas of both the defendants were demurred to generally; and the demurrers were sustained.

The special pleas of Wasson are bad for this reason if no other, that they omit to set out the ground upon which the suspicion and belief of the plaintiff's guilt were founded. Whether the suspicion against the plaintiff was reasonable or not was a question of law for the Court to decide, and the pleas should consequently have shown the cause of suspicion. *Mure v. Kayne*, 4 Taunt., 34. The first of these pleas, it is true, states that the defendant was a justice of

the peace, but that is no excuse for the omission we have mentioned.

The special pleas of Robb state not only that there was a reasonable suspicion, etc., but, also, that he was informed by Wasson and others that the plaintiff was guilty; and the defendant is alleged in the first of these pleas to be a constable. We think, however, that even the first of these pleas should have gone further, and have shown that the defendant's informant stated the facts by which he knew or believed the plaintiff to be guilty; and that the pleas should have set out those facts, in order that the plaintiff could have taken the opinion of the Court on their sufficiency to raise a reasonable suspicion against him. Unless they were sufficient for that purpose, the arrest was not authorized. *Davis v. Russell*, 5 Bing., 354.

The demurrers to the pleas, therefore, correctly sustained. * * *

* * * * *

(f) *Quantity, Quality and Value.*

WIATT v. ESSINGTON.

Court of King's Bench. 1739.

2 Lord Raymond, 1410.

In trespass for breaking the plaintiff's house, and taking away *diversa bona et catalla* of the plaintiff *ibidem inventa*, verdict was given for the plaintiff, and entire damages assessed; and upon Mr. Ward's motion the judgment was arrested, for the uncertainty in the declaration, in not specifying what the goods were, so that this recovery could not be pleaded in bar of another action brought for the same goods. Serjeant Darnall and Mr. Ketelby for the plaintiff.⁸⁵

85. "The law requires no greater certainty than the nature of the thing will admit of; as, where an action is brought for things not subject to distinction by number, weight or measure; as, in trespass for breaking his close with beasts, and eating his peas, without saying how much; yet this declaration hath been held good, because nobody can number or measure the peas that beasts can eat,"—Bacon's Abridgement, Pleas, B. 5, 5.

AMMEL v. NOONAR.*Supreme Court of Vermont. 1878.**50 Vermont, 402.*

The opinion of the court was delivered by

DUNTON, J.: The defendant claims that there is a fatal variance between the contract or agreement set forth in the declaration and the one proved on trial.

* * * * *

The declaration alleges "that the defendant * * * promised the plaintiff, that if she would deed to him certain land, etc., the defendant would, in consideration thereof, pay a certain debt which the plaintiff was owing to one George E. Field * * * of the sum of, to wit, sixty dollars." The declaration was supported by the testimony, except as to the amount of the debt in question, which was shown by the evidence to be fifty-two dollars instead of sixty, as alleged in the declaration. The amount of the debt being averred under a *videlicet*, we do not think the plaintiff was bound to prove the exact sum as laid. The purpose for which matter is so alleged is, that the party pleading it may not be strictly bound by it; and a *videlicet*, when followed by numbers or amount, often indicates that the pleader has not attempted to state the sum with precision. *Crispin v. Williamson*, 8 Taunt. 107; *Bray v. Freeman*, ib. 197; *Cooper v. Blick*, 4 A. & E. n. s. 915; 1 Chit. Pl. 313, 316.

A *videlicet*, however, will not avoid a variance in an allegation of material matter which is of the essence of the contract or description, and essential to its identity. Says Starkie: "In cases of contract, the allegations of sums, magnitude, and duration are usually in their very nature essential to the identity of the contract; they are therefore descriptive, and must in general be proved as laid, unless the mode of averment shows that the party did not profess to state the sum, magnitude, number, etc., precisely." 1 Stark. Ev. 447; *Bray v. Freeman*, *supra*.

In this case, although the amount alleged is descriptive of the debt in question, the mode of its averment shows that the pleader did not attempt to state the sum precisely; and the debt being also described as "a certain debt the plain-

tiff was owing to one George E. Field," we do not think the amount alleged so essential to the identity of the contract as to make the variance fatal.

* * * * *

*Judgment affirmed.*⁸⁶

86. In *Bissel v. Drake* (1821) 19 Johns. (N. Y.) 66, the action was upon a note which the declaration stated under a *videlicet* to be a note for 180 dollars. The evidence showed that it was a note for 300 dollars. It was held that the *videlicet* did not dispense with strict proof, but the court said:—"Where the party is incapable of stating the date and amount of a note, of which he is dispossessed, the law will not require him to make such statement; it will be satisfied by an allegation that the note is of great value, to wit, of the value of a certain sum."

MONTGOMERY & EUFAULA RAILWAY COMPANY v. CULVER.

Supreme Court of Alabama. 1884.

75 Alabama, 587.

This was an action by E. V. Culver against the Montgomery and Eufaula Railway Company, a domestic corporation, operating a railroad in this State, for the recovery of damages "for the failure to deliver certain goods, viz., one trunk, containing one heavy set gold bracelets, twenty-four pieces of sterling silver teaspoons, twelve pieces (silver) table spoons, twelve pieces of dessert spoons, one full set of Rogers table cutlery, consisting of about fifty pieces, and clothing and personal wearing apparel, and also one fine coral set breastpin; which goods were received by defendant as a common carrier, to be delivered to the plaintiff at Birmingham, Alabama, for a reward, which defendant failed to do." The defendant demurred to the complaint, and also to that part thereof "which is in these words, to-wit, 'clothing and personal wearing apparel,' " on the ground, in substance, that said clothing and wearing apparel were insufficiently described. The court overruled the demurrer. * * *

* * * * *

CLOPTON, J.: We see no error in overruling the demurrer to the complaint for want of certainty in the descrip-

tion of the property, which it is alleged the defendant failed to deliver. It is described as "one trunk" containing certain articles, and among others, "*clothing and personal wearing apparel*." The rule as to certainty in pleadings, as observed by Mr. Stephen, "is not so strictly construed, but that it sometimes admits the specification of quality and quantity in a loose and general way." Accordingly, at common law, a declaration in trover for "a library of books" has been deemed good without further description; and so for "two packs of flax and two packs of hemp," without specifying weight or quantity. Stephen on Plead. 298-299. Our own decisions have sustained descriptions equally wanting in details of statement. *Haynes v. Crutchfield*, 7 Ala. 189; *Thompson v. Pearce*, 49 Ala. 210. When specific property is sued for, in an action of detinue, a somewhat stricter rule of description is admitted to prevail. *David v. David*, 66 Ala. 139.⁸⁷

* * * * *

87. Stephen states the rule on this point as follows:—"A general mode of pleading is allowed where great prolixity is thereby avoided." And he illustrates it by the following among other examples:

"In assumpsit, on a promise by the defendant to pay for all such necessities as his friend should be provided with by the plaintiff, the plaintiff alleged that he provided necessities amounting to such a sum. It was moved, in arrest of judgment, that the declaration was not good because he had not shown what necessities in particular he had provided. But COKE, C. J. said, 'this is good, as is here pleaded, for avoiding such multiplicities of reckonings.' [*Cryps v. Baynton*, 3 Bulst. 31.] * * * So, in debt on a bond, conditioned that the defendant shall pay, from time to time, the moiety of all such money as he shall receive, and give account of it, he pleaded generally, that he had paid the moiety of all such money, etc. *Et per curiam*, 'This plea of payment is good, without showing the particular sums, and that in order to avoid stuffing the rolls with multiplicity of matter.' Also, they agreed that, if the condition had been to pay the moiety of such money as he should receive, without saying *from time to time*, the payment should have been pleaded specially. [*Church v. Brownwick*, 1 Sid. 334.]" Stephen on Pleading (Tyler's Ed.) 318, 319.

In *Smith v. Boston, Concord & Montreal Railroad* (1858) 36 N. H. 458, there was an action of assumpsit for breach of a contract to build and complete, in a thorough and workmanlike manner, a railroad twenty miles long, including right of way, track iron, sleepers, fencing, borrowing pits and station buildings, and it was held that an enumeration of the particulars of breach would tend to prolixity, so that a general statement was deemed sufficient.

(g) Matters of Inducement and Aggravation.

RIGGS v. BULLINGHAM.

*Court of Queen's Bench. 1599.**Croke's Elizabeth, 715.*

Assumpsit. Whereas he was seized in fee of the advowson of Beckingham, in the County of Lincoln; in consideration that he, at the defendant's request, by his deed, *dedisset et concessisset*, to the defendant the first and next avoidance of the said church, the defendant, 22 August, 37 Eliz. asumed to pay to the plaintiff 100*l.*, etc. Upon *non assumpsit* pleaded, it was found for the plaintiff, and damages assessed to 100*l.* And, after verdict, it was moved in arrest of judgment. * * * Secondly, the declaration is not good; because there is not any time or place alleged where the grant was made. *Sed non allocatur* for it is but an inducement to the action, and therefore needs not to be so precisely alleged. Wherefore it was adjudged for the plaintiff. *Vide* 29 Eliz., *Marsh v. Kavensford, ante*, 59.

WABASH WESTERN RAILWAY COMPANY v.
FRIEDMAN.

*Supreme Court of Illinois. 1893.**146 Illinois, 583.*

Mr. Justice CRAIG delivered the opinion of the court:

This was an action brought by Oscar J. Friedman, against the Wabash Western Railway Company, to recover damages for a personal injury received on the first day of May, 1888, while plaintiff was a passenger on the defendant's line of road running from Moberly, Missouri, to Ottumwa, Iowa. * * *

[Defendants' railroad ran from Moberly to Kirksville, thence to Glenwood Junction, and thence to Ottumwa. The

accident occurred between Kirksville and Glenwood Junction.]⁸⁸

* * * * *

Upon the question of variance the defendant asked the court to instruct the jury as follows:

“The averment in plaintiff’s declaration that he became a passenger in the train of defendant at Kirksville, Missouri, to be carried from said Kirksville to Glenwood Junction, is material, and must be proved as alleged; and if the jury believe, from the evidence, that said plaintiff did not, at the time in question, become a passenger in said train of defendant at said Kirksville to be carried to said Glenwood Junction, then the jury will find for defendant, regardless of all other questions in the case.”

But the court refused to give the instruction as prayed, but qualified it by adding as follows, to wit: “But if it appear, from the evidence, that plaintiff was a passenger on the train of the defendant between the points mentioned, traveling from a point south of said Kirksville to a point beyond Glenwood Junction, then the averment in the plaintiff’s declaration is sufficiently made out.”

It may be said that the question involved is a technical one, and hence not entitled to that consideration which a court should give to a question which goes to the merits of an action. The plaintiff had the right, when the question was raised, to amend his declaration and thus obviate the difficulty, but he saw proper to take another course, and he occupies no position now to complain should the rules of law that control in such cases be strictly enforced against him.

But while the question involved may be regarded somewhat technical, still it will be remembered that the plaintiff is seeking to recover a large sum of money, and the defendant has the right to demand and insist that the grounds upon which the plaintiff claims a right of recovery should be clearly and concisely stated, and that the case made in the declaration should be proven as laid. If a plaintiff may allege in his declaration one ground of recovery and on the trial prove another, a defendant never could be prepared for trial. One great object of a declaration is to notify the defendant of the nature and character

of the plaintiff's demand, so that he may be able to prepare for a defense; but if one ground of action may be alleged and another proven, a declaration would be a delusion, and instead of affording a defendant notice of what he was called upon to meet, it would be a deception. Here the plaintiff claimed that the relation of passenger and common carrier existed between him and the defendant, and that the defendant owed him a duty growing out of that relation. In speaking of a declaration in such a case, Chitty in his Pleadings says: "When the plaintiff's right consists in an obligation on the defendant to observe some particular duty, the declaration must state the nature of such duty, which, we have seen, may be founded either upon a contract between the parties, or on the obligation of law arising out of the defendant's particular character or situation, and the defendant must prove such duty as laid, and a variance will, as in actions on contract, be fatal." The same author also says: "In an action on the case founded on an express or implied contract, as, against an attorney, agent, carrier, innkeeper or other bailee, for negligence, etc., the declaration must correctly state the contract, or the particular duty or consideration from which the liability results and on which it is founded, and a variance in the description of a contract, though in an action *ex delicto*, may be fatal as in an action *ex contractu*. The declaration in such case usually begins with a statement of the particular profession or situation of the defendant and his retainer, and consequent duty or liability. The declaration will be defective if it does not show that by express contract, or by implication of law, in respect to the defendant's particular character or situation, etc., stated by the plaintiff, the defendant was bound to do or omit the act in reference to which he is charged."

It may, however, be said, that the statement in the declaration of the point from which and to which the plaintiff was being carried was mere inducement, and need not be proved as laid. Upon a question of this character, Chitty in his Pleadings (page 292) says: "In general, however, every allegation in an inducement which is material, and not impertinent and foreign to the cause, and which, consequently, cannot be rejected as surplusage, must be proved as alleged, and a variance would be fatal; and, consequently, great attention to the facts is necessary in framing

the inducement, and care must be taken not to insert any unnecessary allegation." If, therefore, the allegation is to be regarded as inducement, it was necessary to prove it as alleged. And at page 385 the author further says: "It is also a rule, that if a necessary inducement of the plaintiff's right, etc., even in actions for torts, relate to and describe and be founded on a matter of contract, it is necessary to be strictly correct in stating such contract, it being matter of description. Thus, even in case against a carrier, if the termini of the journey which was to be undertaken be misstated the variance will be fatal. Here the allegation in the inducement relates to matter of description."

Harris v. Rayner, 8 Pick. 541, is a case in point. The action was brought to recover for an injury sustained by the oversetting of a stage coach. The plaintiff alleged in his declaration that he paid defendants for his passage in their stage from Albany to Boston ten dollars, the usual fare for said passage, and defendant, in consideration thereof, undertook and promised carefully to transport plaintiff in said passage from Albany to Boston. In support of the declaration plaintiff proved that he was in a stage coach from Worcester to Boston, and that just as he arrived at Boston the coach was upset by the carelessness of the driver, and he was thereby injured. It was held that the evidence did not prove the contract set out in the declaration, and in passing upon this point the court said: "We think there was no sufficient proof, at the trial, of the contract as alleged in the declaration. The declaration alleges a contract on the part of the defendants to transport the plaintiff from Albany to Boston. The proof was that the plaintiff rode in defendants' stage from Worcester to Boston, and although this is part of the route from Albany to Boston, yet it is part also of many other lines of travel, so that the contract as alleged remains without proof."

In *Tucker v. Cracklin*, 2 Starkie, 385, and in *Railroad and Banking Co. v. Tucker*, 79 Ga. 128, actions were brought against carriers for the loss of goods, and in each case it was held that a variance between the proof and allegation as to the termini of the carriage was fatal. In 3 Phillips on Evidence, page 268, the author says: "The plaintiff will be nonsuited if the termini of the journey are not correctly set forth." In *Illinois Central Railroad Co. v. Sut-*

ton, 53 Ill. 398, the point was made that an averment in the declaration of defendants undertaking to convey the plaintiff from West Urbana to Tolono is not sustained by proof of an undertaking to convey from Champaign City to Tolono. In disposing of the question of variance it is said: "It would appear from the testimony that West Urbana and Champaign City are one and the same place, consequently there was no variance."

The averment in plaintiff's declaration that he became and was a passenger at Kirksville to be carried to Glenwood Junction, for reward, was, in effect, a statement that he took the defendant's train at Kirksville for Glenwood Junction and that he had paid, or was ready to pay, his fare from one point to the other when called upon, whereupon there was an implied contract on the part of the railway company to safely carry him from one point to the other. We think it plain that the averment in plaintiff's declaration was not sustained by proof that he became a passenger at Moberly for Ottumwa. It may be true that plaintiff stated more in his declaration than he might have stated—that he might have relied upon an allegation that he was a passenger upon defendant's cars, being carried for reward, without stating definitely the termini of his journey on defendant's line of road; but having gone into detail in his allegations the law requires him to prove them as laid. What is said in *Bell v. Senneff*, 83 Ill. 125, is in point here: "As a general rule a party is required to prove the averments of his pleadings as he makes them. He may aver more than is required, but as a general rule, he must prove them, although unnecessarily made." In *Derringo v. Rutland*, 58 Vt. 128, it was held that every averment which the pleadings make material as a descriptive part of a cause of action must be proved as alleged. and any variance which destroys the legal identity of the matter or thing averred with the matter or thing proved, is fatal. In *State v. Kopp*, 15 N. H. 212, it is said: "It is a most general rule that no allegation which is descriptive of the identity of that which is legally essential to the claim or charge can be rejected." (See, also, 1 Phillips on Evidence, 709, 710; Stephens' Pleading, p. 124, appendix.) Here the plaintiff was bound to allege that he was a passenger on defendant's train of cars for reward. This was material, and the further averment that he became a passenger at Kirks-

ville for Glenwood Junction was descriptive of the identity of that which was legally essential. It could not be rejected or disregarded.

In conclusion, we think it plain, under the authorities, that there was a variance between the proof and the declaration, and the court erred in the admission of the evidence and in the modification of defendant's instruction.

CHAMBERLAIN v. GREENFIELD.

Court of Common Pleas. 1772.

3 Wilson, 292.

London, (to wit).—Richard Greenfield, late of London victualler, was attached to answer William Chamberlain in a plea, wherefore, with force and arms he broke and entered the dwelling house of the said William, situate, standing and being at the parish of Saint Andrew Holbourn, in London aforesaid, and stayed and continued therein for a long time, and during the whole time made a great noise, disturbance and affray therein, and wrenched and forced open, or caused to be wrenched and forced open the closet doors, drawers, chests, cupboards and cabinets of the said William, and the goods and chattels of the said William, of the value of 500*l.* then and there found, tossed, tumbled, damaged and spoiled, and then and there did other wrongs to the said William, against the peace of His present Majesty, etc. * * *

And the said Richard, by Rowland Lickbarrow his attorney, cometh and defendeth the force and injury when, etc., and saith, that the said declaration in the manner and form aforesaid above made, and the matter therein contained, are not sufficient in law for the said William to have and maintain his said action against the said Richard; to which said declaration the said Richard hath not any need, nor is he obliged by the law of the land to answer; and this he is ready to verify; wherefore, for want of a sufficient declaration in this behalf, the said Richard prays judgment if the said William ought to have or maintain his said action against him. And, for causes of demurrer in law in

this behalf, the said Richard, according to the form of the statute in such case lately made and provided, shews to the court here these causes following, to wit, for that the said William hath not in or by his said declaration particularly specified the goods, chattels, wares and merchandise, by the said declaration supposed to have been tossed, tumbled, damaged and spoiled; and for that the charge of wrenching and forcing open the closet doors, drawers, chests, cupboards and cabinets in the said declaration mentioned, is not alleged with sufficient certainty against the said Richard in this, to wit: for that it is alleged that the said Richard wrenched and forced open or caused to be wrenched and forced open the said closet doors, drawers, chests, cupboards and cabinets, and for that the number of closet doors, drawers, chests, cupboards and cabinets in the said declaration mentioned, and thereby supposed to be wrenched and forced open, is not specified; and for that the said declaration is in other respects defective, insufficient and informal, etc.

* * * * *

Serjeant Wilson for the plaintiff argued. That the essential matter of fact or trespass alleged in the declaration, and for which this action was brought, is the breaking and entering the plaintiff's dwelling house; and that the farther description, viz., the making a noise, disturbance and affray, the wrenching and forcing open the closet doors, drawers, chests, cupboards and cabinets, the tossing, tumbling, damaging and spoiling the goods, etc., etc., is only laid by way of aggravation, and to shew how enormous the trespass was; and so it has been often resolved, that there is no occasion to specify in a declaration what belongs to the principal thing, or place trespassed upon, as the dwelling house of the plaintiff, in the present case (certainly) is; the closet doors, drawers, etc., etc., all belong to the house; to this purpose he cited 2 Salk. 642, *Newman v. Smith*, and 643, *Layton v. Grindal*. And 1 Ld. Raym. 588 cites *Boroughs v. Hall*, B. R. Trin., 23 Car. 2, where it was held that trover for a ship *cum armamentis* was good; whereas if the action had been brought for the guns and rigging severally, they ought to shew what and how much; *Serjeant Wilson* concluded that the breaking and entering the plaintiff's house, was the principal ground and foundation of the present action; and all the rest are not foundations of the ac-

tion, but matters only thrown in, to aggravate the damages; and of that opinion were the whole court, and gave judgment for the plaintiff.

(h) *Matters Within the Knowledge of the Other Party.*

GALE v. REED.

Court of King's Bench. 1806.

8 East, 80.

This is an action of covenant, brought by the three plaintiffs against their late partner Reed, for breaches of a covenant contained in an indenture, confirming and carrying into further effect a prior indenture made between them for the dissolution of their partnership; and which indenture, made the 31st of January, 1804, whereupon the breaches are assigned, is as follows: “ * * * And the defendant doth hereby for himself, his heirs, executors, etc., covenant with the plaintiffs, their executors, etc., in manner following, viz. That he, the defendant, shall not in his lifetime carry on the business of a ropemaker, or make cordage for any person or persons whomsoever (except any contract which the defendant may hereafter enter into to make cordage, new or old, or any other articles, for government, or any public board, and which he shall have free liberty, from time to time, to execute and complete) * * * ” The breaches assigned were, 1st, that after the making of the indenture the defendant carried on the business of ropemaker, and made cordage for *divers and very many person other than by virtue of any contract* which the defendant had entered into *after the making of the said indenture, to make cordage, etc., for government*, contrary to his covenant. * * * The declaration assigning these breaches, in *making cordage for others, and employing others, to make cordage*, the defendant, after enrolling the indenture at large, demurred to the first breach; assigning for cause, “that the plaintiffs had not shewn or disclosed any, and what particular person or persons for whom the defendant made cordage, or any and what particular *quantities* or

kinds of cordage the defendant did so make for them; nor in *what manner* or by *what acts* he carried on the said business of ropemaker, as is alleged in that breach of covenant.

* * *

* * * * *

LORD ELLENBOROUGH, C. J., delivered the opinion of the court. After stating the pleadings as above.—It has been contended, on part of the defendant, that the covenant on which the breaches have been assigned is void, as being a contract made *in particular restraint of trade, without adequate consideration to the party restrained*; upon the authority of *Mitchell v. Reynolds*, 1 P. Wms. 181 and other cases. And also, that the breaches are ill assigned in point of form, inasmuch as the “*divers other persons*” alleged to have been employed to make cordage for the defendant (as complained of in those breaches), are generally so described, without mentioning them particularly by their names, or stating the kinds and quantities of cordage made, etc., as the defendant’s counsel contended ought to have been done. As to this objection of form, and which is the cause specially assigned for demurrer, the answer given to it by the plaintiff’s counsel, viz., that as the facts alleged in these breaches lie more properly in the knowledge of the defendant, who must be presumed conusant of his own dealings, than of the plaintiffs, there was no occasion to state them more particularly; is in our opinion a sufficient answer in point of law.

* * * * *

(i) *Profert and Oyer.*

BEEBE v. REAL ESTATE BANK.

Supreme Court of Arkansas. 1842.

4 Arkansas, 124.

Debt, tried in Pulaski Circuit Court, in March, 1841, before the Hon. John J. CLENDENIN, one of the circuit judges. The Real Estate Bank sued Roswell Beebe and others, on a note executed by them, and made no *profert* of the note. The defendants demurred, for want of *profert*, and the de-

murrer being overruled, judgment went for debt, and interest at ten per centum per annum, from the maturity of the note until it should be paid. The defendants sued their writ of error.

DICKINSON, J.: At common law, a party never was required to make profert of a promissory note; the reason was, that it did not constitute the foundation of the action. It was only evidence of the debt, and its execution was required to be proved upon the trial. Profert was given upon sealed instruments, because they constituted the gist of the action, and it was required to enable the defendant to plead knowingly. Oyer was granted upon profert being made; and, upon the making of profert, the party could then plead a special or general plea of *non est factum*, or set up any other defense which might defeat the cause of action. It was the grade of evidence that determined the character of the pleadings. A sealed instrument proved itself. Its execution might be denied, but its consideration could not be impeached. Under our statute, the consideration of sealed and unsealed instruments may both be inquired into, and therefore there is a perfect equality in their grade of evidence. The production of each proves itself, and the consideration for which it was given. This consideration, in both instruments, is liable to be impeached in the same way, but he who impeaches them must do it by plea, supported by affidavit.

It certainly cannot be pretended, that it is not necessary to make profert of a sealed instrument under our statute. Promissory notes carry with them the same evidence of indebtedness that sealed instruments do; and the consideration of both being disproved in the same way, then it necessarily follows, that promissory notes, as well as sealed instruments, under our statute, should be made profert of. This view of the case is strengthened by the words of the act itself (Rev. St., chap. 116, sec. 65), which declares that, when any such instrument is lost or destroyed, an allegation to that effect shall excuse the *want of profert*. This positive provision, making profert unnecessary under such circumstances, certainly implies that, in all other cases, except where the instrument is lost or destroyed, profert should be alleged of promissory notes as well as of sealed instruments.

* * * * *

Judgment reversed.

CHICAGO BUILDING AND MANUFACTURING COMPANY v. TALBOTTEN CREAMERY COMPANY.

*Supreme Court of Georgia. 1898.**106 Georgia, 84.*

[This was a suit founded upon a written contract, of which the plaintiff undertook to make profert and the defendant to demand oyer. This was done irregularly, but was treated by the parties and by the trial court as a proper profert and oyer. The defendant demurred to the plaintiff's petition, and the demurrer was sustained.]⁸⁹

COBB, J.: * * *

1. The first question to be determined is: Did the court have a right to consider this contract in passing upon the demurrer filed to the petition? * * * While at common law profert was required only in cases where the party claimed or justified under a deed, and was not necessary where the suit or defense was founded upon an instrument not under seal, still the rule in this State requires that profert should be made of any note or other instrument which is the foundation of the action, whether the same be under seal or not. Steph. Plead. 67, 437; *Smith v. Simms*, 9 Ga. 418. It seems, therefore, that in the present case the plaintiff should have set out in his petition the substance of the contract which is the foundation of the action, or he should have exhibited to his petition the material parts of the same, or made profert of it in the pleading, that is, after referring to the contract, used the formula, "which is here to the court shown;" and in the latter case the defendant would have had a right to demand oyer of the instrument, that is, that the same be filed for inspection and subject to be treated in the after-progress of the case as embodied in the petition itself. At common law, in all cases where profert of an instrument was required to be made and was made, and oyer was demanded and the instrument read in the days of oral pleading, or filed for inspection since the day of written pleading, the instrument which was the subject of the profert became, after the granting of oyer, a

part and parcel of the pleading which contained the profert. Gould's Plead. (5th Ed.) 408, 409. The author also says; "He who is entitled to, and obtains, *oyer* of a deed, is not bound to take any notice of it in his pleading. The object of granting it being merely to *enable* him to do so, at his pleasure. He *may*, however, after reciting the instrument, *verbatim*, on the record, avail himself of any advantage, which any part of it, not set out by his adversary, may afford him. The mode in which such advantage may be taken, may be either by pleading, or demurring, as the case may require. * * * If the instrument sued upon, or upon which the defense is founded, is, *upon the face of it, void*, either from illegality or otherwise; or is, from any other cause, *insufficient upon the face of it*, to maintain the demand or defense founded upon it; or if there is any material *variance* between the instrument, as recited on *oyer*, and the description of it in the pleading of him who has made *profert* of it; the adverse party may *demur* to the pleading in which the *profert* is made.

* * * The deed, as recited, is considered as parcel of *the pleading* of him who pleads it; and, consequently, has the same effect, as if it had been set out, *verbatim*, in *his own pleading*." Ibid. 418, 419. See also Chit. Pl. 450-451; *Jeffery v. White*, Doug. 476; *Snell v. Snell*, 7 Dow. & R. 257; *Thacker v. State*, 11 Md. 322. There is nothing in this ruling to conflict with the decisions made in the cases of *Const. Pub. Co. v. Stegall*, 97 Ga. 450, and *Aug. & Sav. R. Co. v. Lark*, Id. 800. In those cases the court attempted to consider upon demurrer written statements of facts which had not been made, in any way, a part of the pleadings, and which could not become a part thereof except by an allegation in the petition. It was in those cases held, that upon demurrer to a petition the court could not look outside of the petition. And we so hold here; the effect of the ruling now made being simply that a contract which is the foundation of the action, but which is not actually set out in the petition, becomes nevertheless, in contemplation of law, a part of the same, when a proceeding equivalent to a demand of *oyer* on the one side and the granting of *oyer* on the other has been practically accomplished in the progress of the case. * * *

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LEE v. FOLLENSBY.

*Supreme Court of Vermont. 1907.**80 Vermont, 182.*

MUNSON, J.: The declaration alleges the breaking and entering of the plaintiff's close, and the felling and removal of trees and underbrush there growing. The second and third pleas disclose a defense based upon deeds given by a cotenant of the plaintiff. The third and fourth pleas base the defense upon a license of the cotenant. The questions are raised by a general demurrer to these pleas.

The deeds are pleaded with profert. The plaintiff craves oyer of the deeds, and having heard them read demurs, but without reciting the deeds. Copies are furnished the court on argument.

It is said in Gould's Pleading, Part II, sec. 35, that the object of craving oyer is that the pleader may have an opportunity to recite the instrument, and thus avail himself, upon the face of the record, of anything in the writing which may aid him. It is said in Chitty's Pleading, p. 432, that if one pleading a deed and making profert omits to state any part of it which is material to the case of his opponent, the only way in which the latter can relieve himself is by praying oyer of the deed, and setting it out *in haec verba*.

The reasons for this requirement are obvious, and especially so when the issue is presented by demurrer. A demurrer submits to the court the legal effect of what appears upon the face of the preceding record. When the instrument is recited on oyer, it stands the same as if incorporated in the previous pleading where profert of it is made. If not recited, the facts contained in it are not within the scope of the demurrer. The recital is also essential to a proper evidence of the issues determined, however the case may be presented. If the instrument is not recited, but merely handed up on argument, the case may be determined upon matters which are not contained in the record, but appear only from a loose paper, bearing no mark that connects it with the case, and which may easily fail of preservation in the files.

So the deeds are not before us, and the points depending upon their contents will not be considered.⁹⁰

90. *Form of Oyer, in plea of non est factum.*

And the said C D, by E F his attorney, comes and defends the wrong and injury, when, etc., and craves oyer of the said supposed indenture, in the said declaration mentioned, and it is read to him in these words: (*here set out the indenture verbatim*) which being read and heard, the said C D says that the said supposed indenture is not his deed, and of this he puts himself upon the country, etc. 2 Chitty on Pleading, 461.

* * * * *

(i) *Facts Showing Contract Liability.*

(1) The promise.

BRIDGE v. AUSTIN.

Supreme Judicial Court of Massachusetts. 1808.

4 Massachusetts, 115.

This was an action pending in the county of Middlesex. The declaration was "in a plea of the case for that the said David at Boston, viz., at Charleston aforesaid, on the twenty-second day of October in the year of our Lord, 1805, in consideration that the plaintiff had made him the said David his bailiff of one case of linens, of the value of five hundred dollars, and had agreed to allow and pay him a commission of five per cent. on the proceeds of the sale thereof, promised the plaintiff to transport the same linen to Charleston, in the state of South Carolina, at his the said David's own risk against all danger, excepting the dangers of the seas, and dispose of the same to the plaintiff's best profit and advantage, and render to the plaintiff his reasonable account thereof. Yet the said David, though often requested, has never rendered his reasonable account to the plaintiff touching the premises, or in any wise paid him for said linen, to the damage," etc.

Upon *non assumpsit* pleaded, the cause was tried, at the sittings after the last October term at Cambridge, before the chief justice, whose report was as follows:

On the trial, the plaintiff, to maintain the issue on his part gave in evidence a memorandum in writing signed by

the defendant in the words following—"Boston, Oct. 22, 1805. Received on board the ship *Rodney*, J. Hurd, bound for Charleston, S. C., a case of linens, amounting for the sterling cost to 84*l.* 5*s.* 1½*d.* which I promise to dispose of in Charleston for account of Nathan Bridge, and to account and pay to him the proceeds, and take on myself all risks, except those of the seas, for which I shall charge five per cent. David Austin." And it was agreed by the parties that the said case of linens was transported by the defendant in the said ship to Charleston, where it arrived, and was delivered safe to him by the said Hurd.

The defendant to maintain the issue on his part, gave in evidence that after the case of linen was delivered to him in Charleston, he stored the same in a suitable and convenient store there for sale; that before the same was sold, it was stolen from the said store by some thieves to him unknown, without any fault on his part; that he has never been able to discover the said thieves, or to recover the said linens or any part of them; and that the customary commissions charged by commission merchants in Charleston for the sales of merchandise and making returns, is five per cent. on proceeds.

On this evidence the plaintiff insisted that the defendant was not discharged by the said larceny. The defendant insisted that he was discharged, and if he was not, that he was entitled to another five per cent. besides that mentioned in the memorandum.

I told the parties that as the merits of the cause depended on the legal construction of the written memorandum, I would reserve that construction for the opinion of the whole court; and as there were no sales, I should direct the jury to find a verdict for the plaintiff, and to assess his damages equal to the value of the linens at Boston when shipped, deducting therefrom five per cent. commissions. They found a verdict agreeable to the directions, and the defendant, waiving his right to review, moves for a new trial for the misdirection of the judge.

The cause was continued *nisi*; and now at this term the opinion of the court was delivered as follows by

PARSONS, C. J.: We have considered the memorandum given in evidence, and are all satisfied that the construction of it is agreeable to the direction of the judge, and that the verdict cannot be set aside for his misdirection

supposed by the defendant. Indeed the construction, for which the defendant contends, cannot be admitted; because it is repugnant not only to the express words, but to the manifest intent of the parties.

But in looking into the declaration, it clearly appears to us that the written memorandum was not legal evidence to prove the plaintiff's count. The allegation is, that for five per cent. commission on the sales, the defendant promised to transport the goods to Charleston, S. C., at his own risk against all dangers, except for the seas. The risk of transportation, except of the seas, is the only risk the defendant is there alleged to take on himself, when from the memorandum he is liable to all risks, except of the seas until he account for the proceeds. The contracts are materially different; and as a judgment in this action would not be a bar to another action on the contract stated in the memorandum, the verdict must be set aside, and a new trial granted, when the plaintiff, if he should think proper, may move to amend on terms.

VAVASOUR v. ORMROD.

Court of King's Bench, 1827.

6 Barnwell & Creswell, 430.

Declaration stated, that by a certain indenture between the plaintiff and one J. S. (profert of which was made), plaintiff did demise, lease, and set unto J. S., his executors, administrators, and assigns, certain tenements, to hold, etc., "yielding and paying therefore the yearly rent of 160*l.*, by two even and equal portions in each and every year during the said term, "that is to say, on, etc.," as by the said indenture, reference thereunto being had, would more fully and at large appear. The entry of J. S. was then stated; his assignment to the defendants, their entry, and that rent had accrued for certain periods since. Plea, *nil debet*. At the trial before HULLOCK, B., at the last Lancaster Spring assizes, the reservation of rent appeared, on the production of the indenture, to be in the following words: "yielding and paying during the said term (except as hereinafter mentioned);" and then the reservation was as stated in the

declaration. In a later part of the lease was a covenant, that the lessor should lay out 600*l.* in erecting a steam engine. In a still later part was a proviso, that in case the lessee should, within three years, pay the lessor 300*l.*, in part discharge of the 600*l.* so to be laid out by the lessor, then the rent of 160*l.* should be reduced to 130*l.*; and that if the remaining 300*l.* were paid within six years, the rent should be reduced to 100*l.* No evidence of payment of any part of the 600*l.* was given. It was objected by *Scarlett* and *Parke*, on the part of the defendant, that there was a variance. It was, they contended, clearly established, that upon a plea of *non est factum* to a lease, an exception in a reservation or covenant, not noticed, creates a variance, although a distinct proviso, if not insisted upon, need not be noticed (1 Saund. 234, note (2) c. 5th Edit.); and that although the proviso itself in this case were a distinct one, the exception referring to it was in the body of the reservation, which reservation must, therefore, be read as if it had contained the proviso in the form of an exception; that this, therefore, would have been a variance on a plea of *non est factum* and that *nil debet* put in issue the execution of the indenture stated in the declaration as much as a plea of *non est factum*. On the part of the plaintiffs it was admitted that the reservation should be read as if it contained the proviso in the form of an exception, but it was contended that the distinction between a proviso and an exception did not depend upon the mere form of expression; and that this was a proviso in its nature, for the event might or might not occur; and here it actually had not occurred. The supposed exception was to be a nullity, except on the occurrence of a particular event; and as that had not occurred, it was a nullity, and was properly omitted in the recital of the reservation set out. In instruments in general, no more need be noticed in the declaration than that upon which the plaintiff proposes to rely. The learned judge was of opinion that this was an exception; and that as by the terms of the reservation the whole rent was to be paid only under particular circumstances, such a limitation should have been noticed; although a proviso for a distinct purpose, as for re-entry on nonpayment, would stand on a different ground. The plaintiff was therefore nonsuited.

F. Pollock now moved to set aside the nonsuit, and contended, that the clause in the subsequent part of the lease

referred to in the *reddendum* was a proviso, and not an exception, and that it was unnecessary for the plaintiff to declare upon any more of the deed than the reservation; and it was for the defendant to show the proviso which was in defeasance of the covenants. He cited *Elliott v. Blake*, 1 Lev. 88, *Hotham v. The East India Company*, 1 T. R. 658, 645.

LORD TENTERDEN, C. J.: If an act of parliament or a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it must in pleading state it with the exception; and if he state it as containing an absolute unconditional stipulation, without noticing the exception, it will be a variance. This is a middle case. Here the exception is not in express terms introduced into the reservation, but by reference only to some subsequent matter in the instrument. The words are "except as hereinafter mentioned." The rule here applies "*verba relata inesse videntur*." And the clause *thereinafter mentioned* must be considered as an exception in the general clause, by which the rent is reserved; and then, according to the rule above laid down, the plaintiff ought in his declaration to have stated the reservation and the exception. Not having done so, I am of opinion that the variance is fatal, and that there is no ground for setting aside the nonsuit.

Rule refused.

METZNER v. BOLTON.

Court of Exchequer. 1854.

9 Exchequer, 518.

The declaration stated that, in consideration that the plaintiff would enter the service of the defendant as a commercial traveller for one year, the defendant agreed to

employ the plaintiff in the capacity aforesaid, at and for the yearly salary of 150*l.*, and to continue him in such service for one whole year. Averments, that the plaintiff entered into the service of the defendant in the capacity and on the terms aforesaid, and continued in such service until a certain day before the expiration of the year. Breach, that although the plaintiff was ready and willing to continue in the service of the defendant, yet the defendant wrongfully dismissed him therefrom.

Plea: *Non assumpsit*.

At the trial, before MARTIN, B., at the London Sittings after last Trinity term, the plaintiff was examined, and proved that he and the defendant met at an hotel in London, when an agreement was come to between them precisely as stated in the declaration; that he entered into the employment, and went a journey into the west of England, after which the defendant dismissed him within the year, upon a ground which turned out to be unfounded. On cross-examination, the plaintiff admitted that there was an usage in the trade in which the plaintiff was so employed, that in any yearly hiring of a traveller either party might put an end to the employment on giving three months notice.

It was objected on behalf of the defendant, that, under these circumstances, if such usage was proved to exist so generally as that it was to be considered as imported into the contract of hiring, there would be a misdescription of the contract, and a variance upon *non assumpsit*. The learned judge thought that the contract being for a year was proved according to the allegation, and that the power to determine it, coming by way of defeasance of the contract, need not be noticed by the plaintiff, but must be pleaded and proved by the defendant. The plaintiff's counsel then agreed that it should be taken as a fact that the engagement was so determinable; and the question of damages having been left to the jury, they found a verdict for the plaintiff for 56*l.*

A rule *nisi* having been obtained to set aside the verdict, and for a new trial, on the ground of misdirection,

* * * * *

PARKE, B.: This case was argued during last term, upon showing cause against a rule for a new trial of a cause tried before my Brother MARTIN. My Lord CHIEF BARON, my

Brothers ALDERSON, MARTIN, and myself were present. It was an action of *assumpsit*. (His Lordship then stated the pleadings, facts, and ruling of the learned judge as above set forth.) We think that this ruling of the learned judge cannot be supported.

It is quite certain, that general usages are tacitly annexed to all contracts relating to the business with reference to which they are made, unless the terms of such contracts expressly or impliedly exclude them. This, therefore, must be considered as a contract for the defendant to hire, and the plaintiff to serve for a year, determinable on three months' notice. *Whittaker v. Mason*, 2 Bing. N. C. 359; and the question is, whether in this form of action this power of determining the contract need be noticed by the plaintiff in describing it. In an action of covenant on an instrument *under seal*, consisting of several clauses, there is no doubt the plaintiff may declare upon so much of the deed as contains the covenant on which he proceeds, which is obligatory because it is under seal; and it is for the defendants to show the proviso, if any, which defeats it. (See 1 Saunders, 233 a, note). So, where an interest or estate passes presently, and is to be divested by matter subsequent, it is enough to state the estate which vested; and the matter defeating it must be pleaded by the party who would take advantage of it. *Ughtred's Case*, 7 Rep. 9 b. But this is not either the description of a covenant under seal, or of a vested estate or interest, but of the substance and effect of a parol contract between the parties, and a defeasible contract cannot correctly be described as an absolute one.

It is not true that the defendant undertook to employ the plaintiff for a year in consideration of the plaintiff's services for a year, for the true contract was, that the defendant would employ him for a year, determinable at any time by three months' notice, in consideration of the plaintiff serving him for that time. And if, instead of stating the contract in this short form, it had been expanded into a statement of a contract with mutual promises, the *whole* to be done on each side must have been stated, and it would have been clearly a variance to allege that the contract on the plaintiff's side was to serve *for a year*; because it was only to serve for a year *unless* he or the defendant chose to determine it by three months' notice; and so the corres-

ponding promise to employ by the defendant. The shorter statement in the declaration in this case cannot exonerate the plaintiff from stating the substance of the contract correctly. Had this defeasance been stated by way of plea to this declaration, it would have been demurrable specially, before special demurrers were abolished, on the ground that it amounted to the general issue, because it was a qualification of the contract itself, and therefore an argumentative denial of the contract alleged. The abolition of special demurrers cannot make a difference in the meaning of the words of the allegation, and a contract with a defeasance is not the same as a contract without one, consequently the variance is fatal. We think, therefore, that the ruling cannot be supported.

My Brother MARTIN is not quite satisfied with this view of the case, and would, we believe, decide it otherwise if the decision depended on himself.

Rule absolute.

TEEL v. YELLIS.

Supreme Court of New York. 1809.

4 Johnson, 304.

This was an action of debt, on the 8th section of the act (24th sess. c. 87), to prevent and punish champerty and maintenance, in which there is the following proviso: "That it shall be lawful for any person, being in lawful possession, by taking the yearly rents or profits of any lands, tenements, or hereditaments, to buy or obtain, by any reasonable ways or means, the pretended right or title of any other person thereto." The declaration in this case did not negative the proviso; and a verdict having been found for the plaintiff, a motion was made in arrest of judgment.

VAN NESS, J. * * * The rule is this: If the proviso furnishes matter of excuse for the defendant, it need not be negatived in the declaration, but he must plead it. Such is the proviso in the present case. It forms no part of the plaintiff's title, and affords merely an excuse to the defendant, if he had come within its purview. It would be

unnecessary to proceed further, were it not that these cases are apparently irreconcilable, and it is desirable that the law should be finally and correctly settled. Serjeant Williams, in his note to 1 Saund. 262 says, "But when the exemption is contained under the proviso to a subsequent section or act of parliament, it is matter of defense, and, therefore, it is not necessary to state in the declaration, that the defendant is not within such proviso." The only inaccuracy in this remark consists in restricting the rule to provisos contained in a subsequent section or statute, which was not warranted by the cases. In *Jones v. Axen*, 1 Lord Raym. 119, TREBY, Ch. J., with the concurrence of the rest of the court, says, "that where an exception is incorporated in the body of the clause, he who pleads the clause ought to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to the adversary to show the proviso." The same distinction is adopted in the case of the *King v. Bryan*, 2 Str. 1101, that when the offense is brought within the enacting clause, and the justification comes in by way of proviso or exception, in the first case, it is a matter of defense to be shown by the defendant; in the other case, the exception must be negatived. In *Spires v. Parker* (1 Term, 141), all the judges agree, that the rule is, that anyone who will bring an action for a penalty on an act of parliament, must show himself entitled under the enacting clause; and if there be a subsequent exemption, that is a matter of defense, and the other party must show it to protect himself against the penalty.

The court are of opinion, therefore, that the motion must be denied.

Motion denied.

FIKE v. STRATTON.

Supreme Court of Alabama. 1911.

174 Alabama, 541.

[Plaintiff sued for \$1,015 on account for work and labor and for materials furnished in remodeling and improving defendant's residence. Defendant, in his third plea,

pleaded by way of recoupment that the work, labor and materials were furnished under a written contract between defendant and plaintiff which provided that the work was to be completed and the building turned over to defendant on or before December 20, 1906, in default of which defendant was authorized to retain out of the compensation provided for, the sum of \$10 per day for every day's delay, "delays beyond the contractor's control excepted;" that the plaintiff did not complete and turn over the building to defendant until the latter part of July, 1907, to the damage of the defendant of \$1,000. A demurrer was filed to this plea, on the ground, as plaintiff seems to have contended, that by failing to allege that the delay was not beyond the contractor's control, defendant failed to show any right to damages for such delay.]⁹¹

ANDERSON, J.: When the breach of a contract is relied upon as the gist of the action or defense, it is necessary that the declaration or plea allege a breach; otherwise it will be demurrable. 4 Ency. Pl. & Pr. 937.

If the defendant's promise or engagement contains as a part of it an exception which qualifies his liability, or in certain instances renders him altogether free from liability, the exception must be stated, though this may not be necessary when the proviso does not go to relieve from liability under the contract entirely. 9 Cyc. 752, and cases cited in notes 39 and 40.

Nor is it necessary for the plaintiff to negative a proviso which would defeat his action once vested. The border line as to what conditions or provisions should be negatived in the declaration or set up as a defense is quite narrow, and the question is one which has given the courts considerable difficulty in the few cases in which it has been considered. The two leading American cases on the subject are *Wilmington & Raleigh R. R. v. Robeson*, 27 N. C. 391, and *Freeman v. Travelers' Insurance Co.*, 144 Mass. 572, 12 N. E. 372. These cases seek to draw a distinction between an exception and a proviso, defining them as follows: "A 'proviso' is properly the statement of something extrinsic of the subject-matter of the contract, which shall go in discharge of the contract, and, if it is a covenant, by way of defeasance. An 'exception' is taking some

part of the subject-matter of the contract out of it." A proviso need not be stated in the declaration, for this, says Mr. Chitty, ought to come from the other side. 1 Saunders, 334, N. 2; *Sir Richard Hotham et al. v. East India Company*, 1 Term Rep., 645. In the latter case. ASHURST, J., in speaking of the circumstance which was omitted in the declaration, observes: "This, therefore, being a circumstance, the omission of which was to defeat the plaintiff's right of action, once vested, whether called by name a "proviso," "by way of defeasance," or a "condition subsequent," it must in its nature be matter of defense, and ought to be shown by the defendants.' " *Wilmington Case*, *supra*. Our own court has often recognized a distinction between exceptions and provisos and the necessity to negative them in indictments. 1 Mayfield, p. 447, subd. 33.

We think the true test, however, whether it be called an "exception" or "proviso," is whether or not it is a condition precedent to liability, or whether or not it is a condition subsequent going to defeat the plaintiff's action once vested, or if the existence or nonexistence of the condition is essential to a breach of the contract, or merely affords a defense for a failure to comply with same or for a breach of same. If it is a condition precedent to a breach, but merely justifies or excuses a breach in certain instances or for certain causes, it is defensive matter, which need not be negated or set out in the declaration. *Tyson v. Weil*, 169 Ala. 558, 53 South. 912.

We think the third clause of the contract in question was intended to indemnify the owner of the house by way of liquidated damages against a delay in completing the building, but exempts or relieves the contractor from liability in case the delay was beyond his control. In other words, the proviso was intended as a defense in a certain instance to a right of action vested upon a breach by delay, and is not a condition precedent. "Every case depends upon the nature of the stipulation or condition, as well as upon the form of it."

We think the condition in question was intended to afford defensive matter to the delay by showing that it was not within the control of the contractor—a negative averment peculiarly within his knowledge and upon whom rested the burden of proof, and is not one upon which the plaintiff's right of action is grounded. *Vincent v. Rogers*. 30

Ala. 472; *Gains v. State*, 149 Ala. 29, 43 South. 137; *Farrall v. State*, 32 Ala. 557; 1 Greenleaf on Ev., § 74; *Davis v. Arnold*, 143 Ala. 228, 39 South. 141; *Rogers v. Brooks*, 105 Ala. 549, 17 South. 97. As above stated, the border line between provisos and exceptions is narrow, and there may be authorities and textbooks which would require that this exception be set out in the declaration, but to so hold would be illogical. If the exception had to be negatived by the declaration, the contractor would only have to take issue, and thus show any reasonable cause for the delay peculiarly within his knowledge and without giving the owner the slightest intimation by the pleading what special excuse would be brought forth. As it is, the cross-complaint (which is recoupment plea 3) states a *prima facie* case, and which would be made out by proof of the delay. Then if the contractor does not deny the delay, but confesses it and seeks to avoid it, under the right given him by the contract, he should plead it, and set up the facts relied upon to show that the said delay was not within his control, and which would put the owner on notice of the character of defense he had to meet. * * * The defendant's third plea was recoupment, and was in the nature of a cross-action, but was not defective for failing to negative that the delay complained of was beyond the control of the plaintiff, and the trial court did not err in overruling the demurrer to the same.

* * * * *

The judgment of the law and equity court is affirmed.
Affirmed.

CLARKE v. GRAY.

Court of King's Bench. 1805.

6 East, 564.

LORD ELLENBOROUGH, C. J., on this day delivered the judgment of the court. This was an action of *assumpsit*, brought against the defendants as proprietors of the True Briton stage coach from London to Market-Harborough, to recover the value of goods belonging to the plaintiff, and

sent with the plaintiff's wife as a passenger in that coach and lost in the course of their conveyance. The declaration was in the usual form against carriers for losses by negligence. The loss was admitted. On the part of the defendants it was given in evidence, that they had for twelve or fourteen years past given notice by a board in their coach office, hanging up over the place where the bookkeeper sat, and where places for the coach were taken, parcels received, etc., as follows: "Take notice, that no more than 5*l.* will be accounted for, for any goods or parcels delivered at this office, unless entered as such, and paid for accordingly." The goods lost were admitted to be above the value of 5*l.*; and a verdict was taken for the plaintiff, subject to the question, whether the special contract created by the terms of this notice, and by which the responsibility of the carriers was limited, so as not to exceed the sum of 5*l.* unless where goods were entered and paid for as of an higher value, should have been stated in the declaration. * * * The present case having been argued some time ago, when my Brother GROSE was absent, and the rest of the court upon that argument, and a subsequent consideration of the subject, entertaining considerable doubts, directed it to be argued again this term when the court was full; and it has accordingly been again argued. On the part of the plaintiff, it is insisted that the provision, "that no more than 5*l.* should be accounted for, unless the goods were entered and paid for accordingly," amounts only to a limitation of the damages to be recovered in the event of a breach of the contract of carriage, and not to a qualification of the contract itself. On the part of the defendants it is insisted, that the provision in question is a limitation of the promise itself, and varies that responsibility for the entire value of the goods which the custom of the realm, or the general undertaking to carry safely, stated in the declaration, would otherwise cast upon the carriers. That it is not to be considered as a distinct independent proviso, but as a term and qualification annexed to and making a part of the original contract of carriage itself. But if the obligation to carry safely do not depend on the question of compensation to be paid in case of loss, but be wholly collateral thereto; and if the contract for safe carriage be equally broken by the loss of the goods, whether the sum stipulated to be paid on that

account be much or little, it cannot be said that such stipulation necessarily makes a part of the contract for safe carriage. Indeed its operation and effect may be considered as only attaching and beginning after the question of safe carriage is at an end, by the breach of the contract made for that purpose. Its proper office is to limit the province of the jury in the assessment of damages for a contract broken, and of course has no concern with it as long as it is executory and in the course of its performance. It resembles in some degree the case of a covenant in a lease not to plough ancient meadow or the like, followed by a proviso that in case the same should be ploughed by the tenant thereof he should pay a certain increased rent for the same. In such case it would certainly be in the option of the lessor to declare as for a breach of covenant not to plough, or the lessor may declare at once for a breach of covenant in not paying the stipulated satisfaction for such ploughing. Both the covenant and the proviso in that case form distinct substantive parts of the same lease, as the contract of carriage, and the limitation of the amount of damages to be paid, in case no entry of and payment for the goods have been made, do in this. It is no more necessary to state every part of an agreement not under seal, each part making a distinct contract, than it is of an agreement under seal; it is sufficient in either case to state so much of each as constitutes that contract, the breach of which is complained of, prescribes the duty to be performed, and the time, manner, and other circumstances of its performance, with this difference only, that in the case of an agreement not under seal, the consideration must be stated, and no part of the entire consideration for any promise contained in the agreement can be omitted. In the present case the entire consideration for the promise to carry safely, viz., the delivery of the goods to be carried for a reasonable reward to be therefore paid to the carriers, is stated. This is not like the cases in *Godbolt*, 154 and *Aleyn*, 5, to which we have been referred by the defendants' counsel. Those were cases where the defendant, in consideration of marriage, promised to do several things, for the nonperformance of one of which the plaintiff brought his action, and declared as for a promise to do one thing only, without mentioning the other things. In each case the court was of opinion in favour of the defendant. In

the case in Aleyn judgment was for the defendant, after a verdict for the plaintiff, "because the plaintiff ought to have set forth the whole promise which is entire;" and in the case in Godbolt the question seems to have arisen on the plea of *non assumpsit*, which the court considered as a good bar: "for (as is there said) the contract being entire, if it be not a good plea, the defendant might be charged for the several things," etc., i. e., in several actions. In that case the marriage, and the several things agreed to be performed on account thereof, were respectively considerations for each other: the several things formed but one entire consideration in the whole for the marriage: and if all of them were not stated, the consideration on the one side would have been untruly, and therefore defectively stated. But here the limitation of the carriers' responsibility is no part of the consideration for their promise to carry safely; the reward agreed to be paid them being the sole consideration for such promise on their part. If the entry of the goods and the payment of a price for the carriage proportioned to their value were a part of the consideration for carriage, the nonentry and nonpayment might be pleaded in bar of the action to recover any damages for the loss of the goods; but if this proviso in favour of the carriers, instead of being given in evidence by them on the general issue, had been specially pleaded, it could not have been pleaded as a bar to the action generally, but only as against the plaintiff's recovering more than the sum of 5*l.* on account of the goods being not specially entered and paid for according to their actual value. There are a great variety of agreements not under seal, containing detailed provisions regulating prices of labour, rates of hire, times, and manner of performance, adjustment of differences, etc., which are every day declared upon in the general form of a count for work and labour; and yet, upon the principle contended for, every provision contained in such agreements regulating the duties and limiting the responsibility of the parties in particular events, ought to be stated. To what extent this would go, in declaring upon contracts of affreightment in the nature of charter parties, but not being under seal, builders' contracts, and the like, will readily occur to all persons conversant in the drawing of pleadings at common law. It seems to us, therefore, that it is sufficient to state in the declaration so much of any contract,

consisting of several distinct parts, and collateral provisions, as contains the entire consideration for the act, and the entire act which is to be done in virtue of such consideration; and that the rest of the contract which only respects the liquidation of damages, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the jury in reduction of damages, but not necessary to be shewn to the court in the first instance on the face of the record. If indeed the provision be of such a nature as goes in discharge of the liability of the party under the contract altogether, in case a particular condition is not complied with, as in *Clay v. Willan*, 1 H. Black. 298, where the goods were not accounted for at all, unless properly entered and paid for, that will not merely operate in reduction of the damages, but in bar of the action; and which case, therefore, appears to have been rightly decided on this ground. * * * We are of opinion, therefore, that in the present case, the plaintiff is entitled to retain his verdict for 5*l.*, the limited amount of damages recoverable under this contract. The like judgment in *Marsden v. Gray* and others under similar circumstances.

(2) The Consideration.

KEAN v. MITCHELL.

Supreme Court of Michigan. 1865.

13 Michigan, 207.

COOLEY, J.: Mitchell brought suit against Kean in *assumpsit*, and declared specially that defendant, on a day and at a place named, "for a good and valuable consideration, then and there paid by said plaintiff to said defendant," bargained and sold to plaintiff certain goods and chattels, and then and there, "for the consideration aforesaid," promised and agreed to deliver said goods and chattels to said plaintiff, when thereunto afterwards requested. Breach, a neglect and refusal to deliver. The declaration also contained the common counts. The defendant pleaded the general issue.

On the trial, the defendant objected to the introduction of any evidence under the special counts, for the reason that no consideration was set forth therein for the defendant's promise; but the court overruled the objection, and admitted the evidence offered, and plaintiff had a verdict. The sole question before us is whether the court was correct in this ruling.

In declaring upon simple contracts, except in those cases where the contracts themselves import a consideration, the rules of pleading require the consideration to be set forth. When that which is stated is clearly insufficient or illegal, the defendant may either demur, or move in arrest of judgment, or support a writ of error. But when the mode in which the consideration is stated is defective, informal or uncertain, the declaration will be bad upon special demurrer; but after verdict, a defective statement of the consideration will be aided, provided, by a reasonable construction of the whole declaration, it sufficiently appears that there was a consideration capable of supporting the promise. 1 Chit. Pl. 300.

The consideration is required to be set forth "that the court may see that it is of that kind and nature to sustain the promise." *Lansing v. McKillip*, 3 Caines, 287. It "should be distinctly set out, that the court may judge of it." *Whitall v. Morse*, 5 S. & R., 361. And the declaration should "state the whole consideration expressly and formally, correspondent with the facts in the case, and coextensive with the contract." *Hendrick v. Seeley*, 6 Conn. 179; *Treadway v. Nicks*, 3 McCord, 122.

It is obvious that, if the plaintiff may allege, in general terms, that there was a consideration, without specifying in what it consists, it will be impossible for the court to say, from the declaration, whether that which the plaintiff considers a valid consideration is, in fact, one which will support an *assumpsit*. And it has been held that to allege that the defendant, being indebted to the plaintiff in a sum specified, in consideration thereof, promised to pay, etc., was not sufficient to support a judgment by default, because the cause or consideration upon which the debt was founded was not set forth. *Beauchamp v. Bosworth*, 3 Bibb, 115. See, also, *Maury v. Olive*, 2 Stew. 472, where a similar declaration was held bad on general demurrer. In *Parker v. Crane*, 6 Wend. 648, a declaration for that the

defendant, in consideration that the plaintiff had, before that time, sold and conveyed to the defendant a certain farm, undertook and promised, etc., was held bad on demurrer to a plea, because the consideration being past, it was not alleged to have been done at the request of the party promising. And in *Goldsby v. Robertson*, 1 Blackf. 247, a special verdict, which set forth the consideration in the same form, was held insufficient to authorize a judgment.

In the present case, the declaration simply avers that the promise was made for a good and valuable consideration. It does not undertake to state in what that consideration consists, and is, therefore, more clearly defective than those in the cases cited. If it is sufficient for the party to state generally that the defendant promised, for a valuable consideration, I see no reason why he should not be allowed to state, in terms but a little more general, and without mentioning a consideration, that the defendant made a valid contract, since a valid contract necessarily includes a sufficient consideration; and this form of declaration would give the court quite as much information on the subject as the other. Whether there was a consideration sufficient to support the promise, is a conclusion of law to be drawn from the facts; but the pleader has omitted the facts entirely, and averred only the conclusion of law.

* * * * *

But, although the allegation of consideration in this declaration would be insufficient on demurrer, or to sustain a judgment by default, I am of the opinion that it may be held sufficient after verdict. * * *

The judgment of the court below should be affirmed, with costs.

FINDLEY v. COOLEY.

Supreme Court of Indiana. 1823.

1 Blackford, 262.

BLACKFORD, J.: * * *

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* * * The declaration is said to be defective for not averring the consideration of the notes. The general rule to be sure is that in simple contracts the consideration must

be set out; but in bills of exchange by the law merchant, and promissory notes by statute, are exceptions to the rule. The moment our act of assembly made a promissory note the foundation of an action, the only description of the contract necessary was that of the note itself. The note then became the contract, and instead of being only evidence of a debt as formerly, was constituted by force of the statute a debt *per se*. So that the consideration of a note within the statute need not be averred, any more than that of a bond or bill of exchange. * * *

ROBERTSON v. LYNCH.

Supreme Court of New York. 1821.

18 Johnson, 451.

PER CURIAM. On comparing the special counts with the contract, as proved, we think that the objection as to variance was well founded. The only proof of the terms of the contract is to be found in the letters of the defendant of the 15th of November, and 7th of December, 1817, in which he offers to manufacture the plaintiff's wool into sattinets, for 63 cents per yard, and to deliver the sattinets to the plaintiff in New York, early the next spring; and it appears that in consequence of those letters, the plaintiff sent the wool to the defendant in December, 1817; thereby signifying, that he acceded to the defendant's offer. The question then is, whether the proposed agreement stated in those letters, corresponds with either of the counts. The special counts both charge, that in consideration that the plaintiff had delivered wool to the defendant, the defendant promised to manufacture it. The contract proved is, that if the plaintiff would thereafter deliver wool at New York, the defendant would manufacture it, etc.

* * * The counts charge an agreement to manufacture wool which had been delivered before any contract was made; and the agreement proved is to manufacture wool which the plaintiff should thereafter furnish. * * * There is a variance, which ought to defeat a recovery on the special counts.* * *

92. "The difference of a shilling only between the alleged and the actual consideration defeated the plaintiff in the case of *Durston v. Tuthan*, cited in 3 T. R. 67, and recognized as law in 3 M. & S. 175."—*Cleaves v. Lord* (1854) 3 Gray (Mass.) 71.

STONE v. WHITE.

*Supreme Judicial Court of Massachusetts. 1857.**8 Gray, 589.*

BIGELOW, J.: It is very clear that the plaintiff could not recover against the defendant Snow, upon the counts in this writ, charging him as an original party to the note set out in the declaration. Upon the evidence, it appeared that he was not a party to the note when it was made, and did not partake in the consideration for which it was given. He affixed his name to it several months after its date, and while it was in the hands of the payee. His contract was collateral to that of the signers of the note, and was in its nature a guaranty of their promise. It was essential therefore, in order to charge the defendant upon this contract, to prove a new and independent consideration in addition to that on which the note was founded. Not being a surety acting upon the same consideration with the original promisors, he could be held liable only by proof of some damage or loss to the plaintiff, or some benefit or advantage to the defendant, as constituting a legal consideration for his contract. *Tenney v. Prince*, 4 Pick. 385; *Mecorney v. Stanley*, 8 Cush. 85.

It was not sufficient, therefore, to declare against the defendant as upon a promissory note, where, according to the rules of pleading, the mere statement of the liability which constitutes the consideration is sufficient; but it was necessary, as in all cases of simple contracts, that the declaration should disclose a consideration, either of benefit to the defendant, or of detriment to the plaintiff; as otherwise it would appear on the face of the declaration to be *nudum pactum*. 6th Amer. Ed. 321. 1 Saund. 211, note 2; *Jones v. Ashburnham*, 4 East, 455.

* * * * *

It is a familiar rule of pleading in *assumpsit*, that the consideration, which forms the basis of the contract, must be set forth with great accuracy, as otherwise the whole contract will be misdescribed. This rule, as already stated, does not apply to promissory notes or bills of exchange, which of themselves imply a consideration; but it includes

all other simple contracts and promises, where the plaintiff, in order to sustain his action, is bound to prove a consideration. It is not sufficient to prove part of an entire consideration; nor is it a compliance with the rule to omit proof of a portion of a consideration consisting of several things. The evidence must show neither more nor less of the consideration than is alleged. It must be proved to the extent alleged, otherwise the variance will be fatal. If the proof exceeds the statement of the consideration, or falls short of it, it is equally a misdescription, and does not support the declaration. Thus it has been held, that if two good considerations are alleged, and one of them is not proved, or is found false by the jury, the plaintiff must fail. The only exception to this rule, as applied to contracts which do not of themselves import a consideration, is where several considerations are averred, in part good, and in part frivolous and insufficient. In such case, the insufficient portion is treated as surplusage, and the declaration is supported by proof of that part of the consideration averred in the declaration, which is good and sufficient to support the promise. Lawes on Assumpsit, 56. 1 Chit. Pl. 321-327; *Coulston v. Carr*, Cro. Eliz. 848; *Rawson v. Brown*, 4 Leon. 3; *Lansing v. M'Killip*, 3 Caines, 286.

The application of this rule to the case at bar fully sustains the ground taken by the defendant at the trial. The second and fourth amended counts both aver two good and distinct considerations, either of which were sufficient to support a promise. In each it is alleged that the consideration of the defendant's promise was forbearance by the plaintiff to sue the original parties to the note in compliance with an agreement to that effect, and also that the plaintiff deposited in the hands of the defendant funds and securities to indemnify him for his promise. The evidence tended to prove the former of these allegations; but there was no proof in support of the latter. Under these circumstances it was the duty of the judge to instruct the jury, according to the request of the defendant, that the plaintiff was bound to prove the whole considerations as alleged; and his refusal to do so is good ground of exception. Being a defect in the proof, and not in the declaration, it is not, as urged by the plaintiff, aided or cured by the verdict.

But although the objection was well taken by the defendant, it is of a strictly technical character, and in no way

affects the merits of the case; nor was the defendant at all prejudiced or injured by it in the trial of the case. A good consideration for the defendant's promise was averred, and the verdict of the jury has found that it was proved to their satisfaction. An amendment striking out this part of the consideration, of which there was no proof, will cure the defect, and entitle the plaintiff to hold his verdict. * * *

BADGER v. BURLEIGH.

Superior Court of Judicature of New Hampshire. 1843.

13 New Hampshire, 507.

Assumpsit. The declaration set forth that on the second of February, 1841, in consideration that the plaintiff would buy of the defendant, at his request, a certain horse, at and for the sum of one hundred and twenty-five dollars, the defendant then and there promised the plaintiff that the horse was sound, kind and manageable, and that if he did not, upon trial made by the plaintiff, prove to be kind and manageable, and did not suit the plaintiff, the defendant would take him back and return the money; that the plaintiff, confiding in the promises of the defendant, thereafterwards, on the same day, did buy the horse for the price aforesaid. Yet the defendant did not regard his promises, but craftily and subtly deceived the plaintiff in this, that the horse was not kind and manageable at the time of making said promises and sale, but was unkind, and unmanageable, and in consequence thereof did not upon trial suit the plaintiff; whereupon the plaintiff, on the 19th day of February, 1841, offered and tendered the horse to the defendant, and requested him to pay back said sum of one hundred and twenty-five dollars, which the defendant refused to do.

To prove the contract, a witness introduced by the plaintiff testified that on the 2d day of February, 1841, as the agent of the plaintiff, and by his direction, he went to the house of the defendant to purchase the horse, and told the defendant that he had come to get the horse for the plaintiff; that the defendant, in answer to a question, said he

would warrant the horse perfectly kind, sound, and manageable, and take him back if the horse did not suit the plaintiff, and refund the money. The witness then told the defendant he would take him on those conditions, and paid the money.

The witness further testified that he told the defendant if the horse was hurt while in the plaintiff's possession, the witness would make it good; by which he meant to be understood that the plaintiff would be bound to make it good to the defendant, and that if the plaintiff did not, the witness would pay for the injury. He said to the defendant that if the horse was injured, he would not expect him to take him back.

The defendant objected; that the contract proved did not sustain the declaration, and moved the court to nonsuit the plaintiff, on the ground of a variance.

The court overruled the objection, and instructed the jury that, if believed by them, the evidence was sufficient to sustain the declaration.

The jury returned a verdict for the plaintiff, and the defendant moved for a new trial.

PARKER, C. J.: The rules of pleading, in actions upon contracts not under seal, require that the declaration should set forth the consideration, as well as the promise founded upon it. And if there be more than one consideration, the whole must be alleged and proved as laid. 3 Caines' R. 286, *Lansing v. McKillip*. But it is sufficient to state so much of the contract, when it consists of several distinct parts, as contains the entire consideration for the defendant's promise, and that part of the promise of which the plaintiff alleges a breach. 4 Taunt. 285, *Cotterill v. Cuff*; 6 East, 567, *Clarke v. Gray*; 8 East, 7, *Miles v. Sheward*.

Where there are several distinct considerations for several distinct promises, not having any necessary dependence upon each other, they may be treated as several contracts, although made at the same time. But where there is an entire consideration for several promises, constituting one contract, or several considerations applicable equally to the several parts of the defendant's contract, the whole of the consideration must be stated, otherwise that part of the contract which is alleged to be broken would not, in fact, be truly set forth. Let us enquire, then, what was the contract on the part of the defendant, for the breach of

which the plaintiff seeks to recover damages, and what was the consideration upon which the defendant entered into that contract.

The contract, which the plaintiff alleges was broken by the defendant, was an engagement on the part of the defendant that the horse was sound, kind, and manageable, and that if on trial he did not prove to be kind and manageable, and did not suit the plaintiff, he would take him back, and return the money. The plaintiff alleges that the horse was not kind and manageable, and in consequence thereof did not suit him; and thereupon he offered to return him, but the defendant refused to receive him. This contract, in the express terms of it, was proved by the witness, and to the satisfaction of the jury; and of the breach of it, if it existed, there does not appear to have been any question. So far as the case discloses, this was the entire stipulation on the part of the defendant, and there is no objection that the declaration does not contain sufficient averments in this respect.

The consideration of the contract, as set forth in the declaration, was the purchase of the horse by the plaintiff for the sum of \$125, and this is also established by the evidence.

But, at the time the contract was made, the agent who made the purchase for the plaintiff said that if the horse was injured while the plaintiff had the possession of him, he would make it good; and again, that if injured he would not expect the defendant to take him back. Was it necessary to state this, and to negative any injury in the declaration? It is apparent that this forms no part of the defendant's promise. If the defendant's contract had been, in terms, that he would take back the horse, if he proved not to be sound or kind, provided he was returned uninjured, or on condition that the damage for any injury that he had sustained should be paid, it might have been necessary to state that, in stating the defendant's contract, because he would thereby have made it part and parcel of his promise. But according to the evidence, he did not promise that he would take him back in case he was not injured. That may have been, in point of law, a limitation of his liability, had nothing been said upon the subject; so that he could use any injury that might have happened by way of defence; but he placed no such limitation in terms upon

his promise. And it seems to us equally clear, that what was said by the plaintiff's agent upon that occasion, even if it were construed to be an engagement of the plaintiff himself, should not be regarded as part of the consideration for the defendant's promise. It was not part of the equivalent for which the defendant parted with the horse, and made the promise declared on, but was collateral to it. The consideration for the sale, warranty, and agreement to take back, was, as the declaration alleges, the purchase by the plaintiff, and the payment of the money. What was said about paying damages, in case of injury to the horse, and about the defendant's not taking him back, if injured (even if it be regarded as an agreement of the plaintiff not to require the defendant to take the horse back, in pursuance of his promise, in case he should be injured), related to something which might occur subsequent to the sale, and may well be regarded as a collateral engagement on the part of the plaintiff, of which the defendant might avail himself in defence, or by way of action. It may be true that the defendant would not have sold the horse, and made the contract he did, without such a stipulation; but that does not prove that the stipulation was part of the consideration. If it did, every collateral engagement on the part of the purchaser must be so in every case; for it may be said that without them the vender would not have made the sale. And it may be true, that if the justice of the case required it, this stipulation might be held to operate as a limitation, or qualification upon the defendant's agreement. But the enquiry here is, what did the vender receive, either by way of money, promises, or otherwise, as the equivalent for the sale of the horse, and the contract which he made; and what shape did his promise take, there-upon? The equivalent received by the defendant for his promise is one thing. The plaintiff may have made engagements respecting the subject-matter of the sale, which are quite another matter.

Judgment on the verdict.

(3) Performance of Conditions.

HALSEY v. CARPENTER.

Court of King's Bench. 1615.

Croke's James, 359.

Debt upon an obligation, conditioned for the payment of thirty pounds to H. S., J. S. and A. S. *tam cito* as they should come to age of twenty-one years. The defendant pleads, that he payed those sums *tam cito* as they came of age; and it was thereupon demurred, because it is not shewn when he came of age, and the certain time of the payment.

And for this cause all the court held the plea to be ill, for although it be a good plea regularly to the condition of a bond to pursue the words of the condition, and to shew the performance, yet COKE said, there was another rule, that he ought to plead in certainty the time and place, and manner of the performance of the condition, so as a certain issue may be taken, otherwise it is not good; wherefore, because he did not plead here in certainty, it was adjudged for the plaintiff. And between the same parties in another action of debt upon an obligation, the condition being for the performance of legacies in such a will, he pleading performance generally, and not shewing the will, nor what the legacies were, it was adjudged for the plaintiff.

RIDGWAY v. FORSYTH.

Supreme Court of New Jersey. 1823.

7 New Jersey Law, 98.

KIRKPATRICK, C. J.: The instrument upon which this action is founded, is the assignment of a bond given by one Barzillai Wright to Joshua Forsyth, the defendant. The bond is dated January 1, 1817, and is conditioned for the payment of \$3,210, with interest, on the first day of April, 1818. The assignment is dated April 11, 1817, and, among

other things, contain the following words, viz.: "That I will guarantee the payment of the money due and to become due on the said bond, it being understood that the said Jacob Ridgway, his executors, administrators, and assigns shall, as soon as the money on the said bond shall become due, take necessary legal steps to enforce the payment thereof by the said Barzillai Wright, and that I am only to be called upon in the event of his inability to pay."

The plaintiff, in his declaration, avers performance of this condition, in these words: "And the said Jacob Ridgway, in fact, saith, that as soon as the money in the said bond or writing obligatory became due, agreeably to the condition thereof, he, the said Jacob Ridgway, did take the necessary legal steps to enforce the payment thereof by the said Barzillai Wright, to wit, at Mount Holly, in the county aforesaid, and so that he hath well and truly performed," etc.⁹³

* * * * *

It is a rule in pleading, that the plaintiff, in his declaration, must aver everything that is necessary to maintain his action. In all cases, therefore, where the right of action depends upon a condition precedent, he must aver the performance of that condition, by whomsoever it is to be performed. *Ughtred's case*, 7 Co. 10a. The averment in the plaintiff's declaration is in the nature of a plea of performance, and must have all the qualities of such a plea. If the condition precedent be in the affirmative, as that the plaintiff shall do a certain act or thing which is a mere simple matter *in pais*, of which the jury are to judge, he may plead performance generally, in the words of the condition; but if the act or thing to be done be such as necessarily involves in it a question of law, as to what shall or shall not be considered as a performance, of which the court is to judge, then an averment of performance generally, in the words of the condition, is not enough; but the party must go farther, and allege, specially, what has been done, that the court may judge whether it amounts to a performance or not. And of this our books afford many examples; as if a condition be to *levy a fine*, to *suffer a nonsuit*,

93. The defendant filed three pleas in which the performance of the condition was denied, to which pleas special demurrers were filed, but the court held that the pleas were really aimed at the sufficiency of the declaration, and carried the demurrers back to the declaration.

to make a bond, or release, or discharge, or acquittance, or to perform a will, etc. In these, and cases like these, the party must aver specially, and shew to the court, in particular, what was done, so that they may judge whether the condition has been performed or not.

The words of the condition precedent in this case are of this nature. What are and what are not legal steps to enforce payment, is a question of law, which must be determined by the court, and can, by no form of pleading, be put upon the jury. It is manifest, therefore, that the steps which have been taken to enforce the payment must be laid before the court in pleading, otherwise they have no grounds upon which they can possibly form a judgment.

I am of opinion, therefore, that the declaration, in this respect, is bad, and that there must be judgment for the defendant.

*Judgment for defendant.*⁹⁴

94. Concurring opinion of FORD, J., omitted

BYRNE v. McNULTY.

Supreme Court of Illinois. 1845.

7 Illinois, 424.

TREAT, J.: In March, 1841, John McNulty and Philip Byrne, being the proprietors of adjoining lots in the city of Galena, executed an agreement under seal, by which McNulty agreed to build a division wall between the lots, of certain specified materials and dimensions, to be completed during that spring or the following summer; and Byrne, on his part, agreed to pay McNulty in March, 1843, one-half of the expense of building the wall. In May, 1843, McNulty instituted an action of covenant against Byrne, on the aforementioned agreement, averring in his declaration that he had well and truly performed the covenants on his part, and had built and completed the wall according to the directions of the agreement, and assigning as a breach the nonpayment by Byrne of one-half of the cost of erecting the wall. There was a demurrer to the declaration, which the court overruled. A jury thereupon assessed the

plaintiff's damages at the sum of \$307.93, and the court rendered judgment on the assessment. Byrne prosecutes an appeal, and assigns for error the decision of the circuit court overruling the demurrer to the declaration.

There can be no doubt that the building of the wall was a condition precedent to the payment of the money, and that McNulty could not maintain an action on the covenant without showing the performance of the condition. The question then arises, whether the general averment of performance is sufficient, or whether the mode and manner of the performance should be specifically alleged. The general rule on the subject of averment by the plaintiff, in the action of covenant, may be briefly stated and illustrated. Where the covenant is definite in its terms, and the act to be done by the plaintiff is purely a matter of fact, it is not only sufficient, but the most proper, to aver performance in general terms, without alleging particularly how he has performed. Thus, if the covenant be to pay money or deliver goods, an averment that the money has been paid, or that the goods have been delivered, or even in more general terms, that the plaintiff has kept and performed the covenants on his part, will be fully sufficient. The performance is merely a question of fact, to be ascertained by the jury from the testimony. But where the act to be done necessarily involves a question of law, the general allegation will not suffice, but the *quo modo* must be pointed out and averred. As, if the covenant be to give an acquittance, or to execute a conveyance, the acquittance or the deed must be set out and brought before the court, so that its sufficiency and legal effect may be seen and determined. This becomes a question of law, and not of fact, to be decided by the court, and not the jury. So, where the covenant is indefinite, or in the alternative, the general averment is not sufficient, but the *quo modo* must be shown. These distinctions run through the books. Com. Dig. "Pleader," C. 60, 61; 1 Chitty's Pl. 357; *Thomas v. Van Ness*, 4 Wend. 549; *Glover v. Tuck*, 24 do. 153. The decision in the case of *Davis v. Wiley*,⁹⁵ 3 Scam. 234, does

95. In this case defendant "covenanted to give the plaintiff, Wiley, a job of 800 rods of ditching, at 62½ cents per rod, and pay him therefor \$300, on the 1st of December ensuing, and \$200 in twelve months thereafter. The plaintiff on his part covenanted to commence the work immediately, and continue the same until completed, if weather and health permitted; but if he should be taken sick, the defendant was to receive the ditching then made, and wait with him until he was able to finish the remainder."

not conflict with the rule before laid down. In that case, the averment on the part of Wiley was not certain and explicit as to the manner and time of its performance. The time within which it was to be performed was subject to contingencies, provided for in the agreement. The plaintiff might have kept and performed his covenant up to the bringing of the suit, and still not be entitled to recover the price. It was proper, therefore, in that case, to require him to point out and specify the mode and extent of the performance. Testing this case by the rule before stated, there is no difficulty in correctly determining the question before us. The covenant on the part of McNulty was clear and definite. The act to be performed by him was purely a matter of fact. Whether he had erected the wall according to the terms of the agreement, and within the time limited therein, were simply questions of fact to be determined by the jury from the testimony introduced on the trial by the parties. The declaration was sufficient, and the demurrer was properly overruled.

The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

LAWSON v. TOWNES.

Supreme Court of Alabama. 1841.

2 Alabama, 373.

This action was brought in the Court below, by the defendants in error, against the plaintiffs in error, as guarantors of one Walter West. The guaranty is to the following effect:

“Talladega, Nov. 22, 1836.

“Whom it may concern: We, whose names are hereto subscribed, do recommend Walter West to be a man of honest character; and that he wishes to procure a stock of liquors and other articles to furnish a confectionery; and that he will be true and responsible for any contract that he may make. And that we, the subscribers, do warrant such contract to be fulfilled. Give under our hands as above.”

(Signed by the parties.)

The declaration charges the execution of the letter of credit by the defendants, and its delivery to West; that he presented it to the plaintiffs; and that upon the faith and credit of the guaranty, they sold him liquors and other articles to furnish a confectionery, amounting to the sum of three hundred and eighty-nine dollars; that West did not pay the debt when it became due; that they have prosecuted him to insolvency with due diligence; and concludes by averring, "of all which said defendants had due notice," whereby, etc.

The defendants demurred to the declaration, which was overruled by the court. * * *

ORMOND, J.: The objection taken to the declaration is that there was no sufficient notice of the acceptance of the guarantee, and of the failure of West, to whom the letter of credit was given, to pay the debt. It is very clear, that the guarantors were entitled to notice that credit had been given to West, on the faith of the guaranty, within a reasonable time afterwards, that they might know the extent of their liability, and, if necessary, be enabled to take the proper steps to secure themselves. As their undertaking was not absolute, but conditional, and depending on the failure of the principal debtor to pay, it was also necessary, to fix their liability, that demand of payment should have been made of the principal debtor within a reasonable time, and notice given to them of his refusal to pay. But it was not necessary to charge them, that legal proceedings should have been commenced and prosecuted against the principal debtor, but only that the creditor should have used reasonable diligence in making demand, and giving notice of non-payment. This is the general mode applicable to this class of contracts, and peculiarly proper in this case, where the letter of credit was not addressed to any particular person, and was for an indefinite sum. (See *Douglass and others v. Reynolds and others*, 7th Peters, 113; *Lee v. Deck*, 10th *ibid.* 482; *Olney v. Young*, 2 H. Black. 613.)

In all cases where the liability of the defendant depends on notice of the existence of a particular fact, such notice is of the gist of the action, and should be specially averred; and it should also appear, that it was given in due time and to a proper person. (1 Chitty on Pleading, 321.) The only averment in the declaration of notice, is to the following effect: "The plaintiffs have prosecuted the said West to

insolvency, and after using due diligence, have failed to collect the same, or any part thereof; nor has any other person paid any part thereof to said plaintiffs, or other person for them; of all which said defendants had due notice, whereby," etc.

It has been shown that, to fix the liability of the guarantors, it was necessary, within a reasonable time afterwards, to give them notice, that credit was given on the guaranty; and also notice of nonpayment, within a reasonable time after the debt fell due. The general allegation of notice at the close of the declaration, although informal, might be sufficient on general demurrer, if there were facts stated in the declaration on which, by reference, it could operate. It is true it appears when the credit was given, and its amount; but it does not appear when the debt fell due, nor when demand of payment was made, nor indeed, that any demand was in fact made. The suit, which it may be inferred was brought, from the averment, that West was prosecuted to insolvency, might indeed be considered a demand; but it is not stated when it was brought. It may not have been brought within a reasonable time, and if not, the defendants are not liable, even if notice was in fact given, that the suit had been instituted.

There is, therefore, no liability on the part of the defendants shown in the declaration, as the very gist of the action is omitted. The demurrer, therefore, should have been sustained to both counts of the declaration.⁹⁶

96. But the form of the notice does not have to be stated, in the absence of a contract or statute requiring a particular form. Thus, in a declaration against an indorser of a promissory note, Chitty gives the following form for an allegation of notice of dishonor,—“of all which said several premises the said C D afterwards, to wit, on the day and year last aforesaid, at, etc., aforesaid, had notice.”—Chitty on Bills, Appendix, sec. 2.

* * * * *

COLT v. MILLER.

Supreme Judicial Court of Massachusetts. 1852.

10 Cushing, 49.

METCALF, J.: The plaintiff's declaration sets forth an executory agreement of the defendant to do certain work for a certain sum, and within a certain time, on materials

to be furnished by the plaintiff, and alleges that the plaintiff did furnish the materials to the defendant in season for him to complete the stipulated work within the stipulated time. And the question is, whether this declaration was legally proved by evidence that the plaintiff furnished the materials to the defendant, but not in season for him to complete the work thereon according to the agreement, and that the defendant nevertheless received and worked on them. We are of opinion that it was not; but that there was a fatal variance between the allegation and the proof.

It is a cardinal rule of evidence, that allegations essential to the plaintiff's claim must be proved. In the declaration in this case, it was essential, in order to show the plaintiff's claim, that he should allege that he furnished or was ready to furnish the defendant with the materials on which he was to work, and in season for him to complete the work on them within the stipulated time; or else that he should allege a sufficient excuse for not so furnishing them. 1 Chit. Pl. (6th Am. Ed.), 351, 358; 6 Greenl. 111, 112; 2 Met. 502, 503. The plaintiff has adopted the former course, and has alleged his performance of what the agreement required of him; and to prove this allegation, he relies on evidence of matter which excused him from such performance, to wit, a waiver thereof by the defendant. But a waiver, by one party to an agreement, of the performance of a stipulation in his favor, is not a performance of that stipulation by the other party. It is an excuse for nonperformance, and, as above stated, should be so pleaded.

The ground taken by the plaintiff is, that the defendant by his conduct, waived his right to be furnished with the materials according to the agreement, and that proof of such waiver supports the averment that the plaintiff did furnish them according to the agreement. And two cases were cited in which it was held that, in an action by the indorsee of a note against the indorser, the allegation, that notice was given to the defendant of nonpayment by the promisor, was supported by proof that the defendant waived such notice. Those decisions have often been questioned, and are certainly contrary to the law as held in England. *Burgh v. Legge*, 5 Mees. & Welsb. 418; *Chit. on Bills* (10th Am. Ed.), 577. But supposing them to have been rightly decided, they only show a single exception to an established rule.

New trial granted.

(4) The Breach.

HOLMAN v. CRISWELL.

*Supreme Court of Texas. 1854.**13 Texas, 38.*

HEMPHILL, Ch. J.: This is a suit for specific performance. The plaintiff alleges that Jerome B. Alexander, in his lifetime, on the 30th December, 1840, executed to one Horatio Griffith his bond for title to 220 acres of land; that the said Horatio Griffith, on or about the 18th of February, 1847, assigned his interest in said bond and the land therein to be conveyed to one Michael B. Griffith, who afterwards, in 1849, assigned said bond to petitioner.

* * * * *

The defendants filed a general demurrer and other pleas, to which reference is unnecessary, as the only point which will be examined is that which arises on the assigned error in overruling the demurrer.

The grounds assumed by counsel in their elaborate argument in support of this assignment are:

1st. That there is no averment of breach of the conditions of the bond.

2d. * * *

To sustain the first ground several authorities have been cited from common-law writers and report, to the effect that in actions on penal bonds breaches must not only be assigned, but stated with such particularity and certainty that the defendant may know what to defend. This action, however, if brought in courts where there is a distinction between law and equity, would have been prosecuted in a court of equity. But there is no material difference in substance in the certainty with which the grounds of complaint must be set forth, whether an action be instituted in the one forum or the other. In equity the bill must state, not only the right, title, or claim of the plaintiff, with accuracy and clearness, but also the injury or grievance of which he complains; or, in other words, in cases such as the one before the court, the breach or nonperformance of his obligations on the bond.

Our own statute, however, furnishes the authoritative rule as to the matters which must be set forth in the petition, and this requires a full and clear statement of the cause of action with such other allegations, pertinent to the cause, as may be deemed necessary to sustain the suit. (Hart. Dig., Art. 671.)

(Referring to the authorities to ascertain the definition and scope of the phrase "cause of action," we find that the breach of contract or covenant sued upon is one of its essential elements. Chitty, in treating of the statement of the cause of action in *assumpsit*, says that the breach of the contract, being obviously an essential part of the cause of action, must, in all cases, be stated in the declaration (Vol. 1st, p. 322), and its omission cannot be cured even by verdict. (Id., p. 337.) This is said in treating of the statement of the cause of action in *assumpsit*, but the rule is the same in action of *debt*, covenant, etc.)

The rule is founded in good sense, and has as much application in our system of pleading as in any other. Unquestionably, in the nature of things, there can be no cause of action where no injury has been done. The invocation of the remedial aid of a court necessarily presupposes the infliction of some wrong for which redress is sought, and this wrong must, as a matter of course, be stated in all courts where the formality of pleading is required; and if it be not averred, no such case is made as entitles the complainant to the interposition of the court.

The only difficulty in holding that the averment of breach is in all cases an essential portion of the statement of the cause of action, consists in this, that in some cases it is not incumbent on the plaintiff to prove the breach or nonperformance of the contract or covenant. Its execution being established and its maturity passed, its breach will be presumed.

There is no doubt, that as a general rule, the plaintiff cannot be compelled to assert more facts than on a general denial he would be bound to prove in order to sustain his case. We have repeatedly held that he cannot prove what he has not alleged, and as a general rule he ought not to be compelled to allege what he is not bound to prove. But there is another general rule of like cogency and pervasive influence in pleading, and which is specially applicable to the question at issue, and that is, the plaintiff must allege

such facts in his petition as would, were they admitted to be true, entitle him to a judgment; and this certainly he could not demand unless he complained that some wrong or injury had been done him, or that some right had been withheld.

For instance, in this case it may be true that Alexander entered into the obligations which had been averred. The demurrer admits that such is the fact. But this fact alone would not authorize a decree for specific execution.

The bond may have been fulfilled. The obligor may not have refused, expressly or impliedly, to perform its stipulations. If so, the plaintiff has no ground of complaint, or to apply to the court for relief.

He has not stated that the obligations have not been performed, and if on his averment merely that such obligations were made, judgment be given in his favor, the absurdity might be presented of a judgment being for him, when in fact he had no ground to complain against the defendant, and this, too, when he had not stated that he had any such ground, and when the defendant may fully have discharged his obligations.

It is true that the plaintiff has alleged that he is entitled to judgment. But this is a legal conclusion drawn by the pleader from the facts stated. It is not a fact, and consequently is not admitted by the demurrer, whose office is to admit facts only, and those which are well pleaded.

The circumstances that the plaintiff would not, on the trial, by the rules of evidence, be required to prove that the conditions of the bond had not been fulfilled, that such would be the *prima facie* presumption on the introduction of the bond, does not relieve him from the necessity of making out such a case by his allegations as would, if their truth were admitted, be followed by judgment in his favor. Where suit is brought on a note of hand, the execution of the note, unless denied on oath, need not be proved, nor is the fact of nonpayment to be established by proof; but this certainly would not exempt the plaintiff from stating that such note had been made, and that it had not been paid, or other equivalent averments of its execution and subsisting obligation; and without such averments the petition would be insufficient, as not showing that any wrong had been done, or that the plaintiff had, in fact, any cause

why he should bring his action.⁹⁷ The rules of evidence may be changed or modified. Parties may not in special cases be required to prove the facts which constitute their cases. But this does not relieve them, if they plead at all, from the necessity of stating such a case as would on its face be entitled to relief from the court.

We are of opinion that on the first ground, viz., the want of assignment of breach, the demurrer should be sustained.

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BROWN v. STEBBINS.

Supreme Court of New York. 1843.

4 Hill, 154.

By the Court, BRONSON, J.: The contract with its recitals amounts to this: The defendant Stebbins had mortgaged a farm to the plaintiff, and the plaintiff wished to obtain further security for the payment of the mortgage debt. Stebbins owned several lots of land at Bangor, from the sale of which the whole or some part of the debt might be paid. He covenanted with the plaintiff that he would sell the lots "to the best advantage"—in other words, for the best price—he could obtain for the same in cash between the date of the agreement and the first day of October then next, and that he would "pay the proceeds of said sales" (deducting expenses) to the plaintiff by the first day of October, to be applied on the mortgage. Thus far we have nothing but the several covenant of Stebbins. But Thurber now comes in as a surety, and then we have the joint covenant of both defendants "that the said moneys so received as aforesaid shall be paid to said Brown." This only bound Thurber to see that the proceeds were paid over in case sales should be made. The plaintiff wanted something more. A further joint covenant was therefore added, "that said Stebbins shall use all necessary care and dili-

97. See *Douglass v. Central Land Co.* (1878) 12 W. Va. 502, given *infra* in the text, on the question whether an allegation of non-payment is necessary in a declaration in debt or assumpsit. See also a note in Ames' *Cases on Pleading* (2nd Ed.) 320, citing many cases on this point, most of them, however, being cases decided under the Code.

gence in the sale of said lots." On a fair construction of this covenant, I think the defendants undertook for two things—first that Stebbins should use all necessary care and diligence to make sales within the specified time; and second, that he should use such care and diligence to sell the lots "to the best advantage," or for the best price that could be obtained for the same within that time.

The breaches assigned are substantially the same in both counts. One breach is, that the defendants, or either of them, did not pay the proceeds of the sale of the lots to the plaintiff. This is bad. It can only be made out by argument and inference, if at all, that there were any sales or proceeds, and the demurrer is special. It does not follow from the fact that no proceeds were paid over, that there were any proceeds to be paid over. The fact that sales were made and moneys received by Stebbins should have been directly alleged. (*Serra v. Wright*, 6 Taunt. 45.) If there were no sales, it is impossible that there should be a breach of this covenant. Another breach to which objection has been taken by special demurrer is, that "Stebbins did not sell and dispose of the lots to the best advantage, or for the most he could obtain for them." Does the pleader mean that Stebbins did not sell at all, or that he did not sell for the best price which could have been obtained? It is impossible to say which. If there was no sale, that fact should have been directly alleged; and if the complaint be that Stebbins sold, but did not get the best price which could have been obtained, the pleader should have said so in explicit terms. Without such an averment the defendants can neither know how to plead, nor what evidence they may expect to meet on the trial.

The breach is not assigned in the words of the joint covenants, or either of them. And when the pleader undertakes to assign a breach coming within the substance, effect or intent of the covenant, he is held to a more strict rule than when he follows, either negatively or affirmatively, as the case may be, the words of the contract. (Com. Dig. Pleader, C. 47.)

The remaining breach is, that Stebbins did not use all necessary care and diligence in the sale of the lots. Here the pleader has followed and negatived the words of one of the joint covenants, and as a general rule that is suffi-

cient. (*Hughes v. Smith*, 5 John. 168; *Smith v. Jansen*, 8 John. 111; *Karthans v. Owings*, 2 Gill & John. 430; *McGeehan v. McLaughlin*, 1 Hall, 33; Com. Dig. Pleader, C. 45; 1 Chit. Pl. 365, 6 Ed. of '37.) There is an exception to the rule, where this mode of pleading does not necessarily amount to a breach of the covenant. (*Juliand v. Burgott*, 11 John. 6; *Gould v. Allen*, 1 Wend. 182; *Thomas v. Van Ness*, 4 Wend. 549.) It is undoubtedly true that the defendants may suffer some inconvenience for the want of a more specific breach. They are not advised whether the plaintiff intends to go for a want of care and diligence to make sales, or for not selling at the best price which might have been obtained, or for both. But still the rule is well settled that the pleader may follow the words of the covenant, either negatively or affirmatively, as the case may be, where that will necessarily show the contract has been broken; and such is the case here. If Stebbins has not used all necessary care and diligence in the sale of the lots, the defendants have not kept their covenant.

As this breach is well assigned, and the demurrer goes to the whole declaration, the plaintiff is entitled to a judgment. The defendants should have pleaded to the breach in each count which is well assigned, and demurred to the others.

*Judgment for the plaintiff.*⁹⁸

98. In an action on a covenant to perform an award, it is necessary to state fully and certainly what the award required in order to show a breach of the covenant.—*Dale v. Dean* (1844) 16 Conn. 579.

JULLIAND v. BURGOTT.

Supreme Court of New York. 1814.

11 Johnson, 6.

This was an action of debt on a bond, dated 3d December, 1811, with a condition that the defendants should secure certain lands (sold and conveyed by Peter Burgott and wife, by a warranty deed, dated the 30th of September, 1811, to Henry Van Vliet, and conveyed by him, by deed, dated the 3d of December, 1811, to the plaintiff) in the peaceable

and quiet possession of the plaintiff, his heirs and assigns, "free from all legal encumbrances, either by deed or mortgage, or otherwise, now in existence and binding on the premises," etc.; and it was expressly agreed and understood that the defendants were "to see the lands free from all encumbrances as above mentioned, by the 20th of February, 1812," etc. The plaintiff averred that the defendants, although often requested, etc., did not free, nor cause to be freed, the land above described from all legal encumbrances, either by deed, mortgage, or otherwise, then in existence, and binding on the premises, by the 20th of February, 1812, etc., in the words of the condition.

The defendants demurred to the declaration, and there was a joinder in demurrer, which was submitted to the court without argument.

PER CURIAM. Without noticing other points in the case, the declaration is bad in substance, in not assigning a sufficient breach. The breach is, that the defendants "did not free the land from all legal encumbrances, either by deed, mortgage, or otherwise, then in existence and binding on the premises, by the 20th of February, 1812." This was following and negating the very words of the condition of the bond; but unless such an assignment necessarily amounts to a breach, it is insufficient, and here it does not; for *non constat* that there was any existing encumbrance on the 20th of February, 1812. The condition spoke hypothetically of legal encumbrances, either by deed, mortgage, or otherwise, then in existence. It did not refer to any particular encumbrance, nor was any alluded to in the recital to the condition. By the generality of the terms, and by the words or otherwise, it is most apparent that the bond was taken for greater caution, and to guard against any such encumbrance which might then be in existence. It was incumbent, therefore, on the plaintiff to have shown at least some existing encumbrance at the commencement of the suit, or on the 20th of February, the time referred to in the bond. He has shown none; there is, then, no certain cause of action appearing in the declaration, and the defendants are entitled to judgment, with leave to the plaintiff to amend on the usual terms.

Judgment for the defendants.

SHAEFER v. MINOR.

High Court of Errors and Appeals of Mississippi. 1835.

1 Howard, 218.

Action of debt in the circuit court of Claiborne county, by Abraham K. Shaefer, assignee of the coroner of said county, against William B. Minor *et al.* on a bail bond. The condition of the bond declared on, is in these words: "In case the said Minor shall be cast in the said suit, if the said Minor shall pay and satisfy the condemnation of the court, or render his body in execution of the same, or in failure thereof, that the said, etc., shall do it for him, then this obligation to be void," etc. The breach of the bond assigned, by which it is said to have become forfeited, is, "that the said Minor hath not complied with the tenor of his said bond, in this that he hath not abided by, or performed the order and judgment of the circuit court, by paying and satisfying the said judgment, etc., whereby, etc."

The defendant below demurred, and for cause of demurrer, assigned:

That the declaration is defective, in not averring a breach in the alternative like the condition of the bond. The court sustained the demurrer and judgment for the defendant. An appeal was prosecuted.

SHARKEY, Ch. J., delivered the opinion of the court.

* * * * *

* * * The condition of the bond as set out is, that the defendant shall pay the condemnation of the court, or render his body in execution. The condition is in the alternative, either that he should perform the one or the other of the terms, and the performance of either would, of course, be a compliance with the condition, and discharge the obligation and release the sureties. The plaintiff has assigned for a breach, that Minor did not perform the condemnation of the court by the payment of the amount of the judgment, but has not averred the nonperformance of the alternative. It may be, for anything that appears in the declaration, that Minor did render his body in execution, in strict pursuance of his undertaking; and if so, the condition was performed. The plaintiff should also have as-

signed as a breach that Minor had not rendered his body in execution.

The judgment of the court below must be affirmed.

DAVIS v. DICKSON.

Supreme Court of Alabama. 1830.

2 Stewart, 370.

This was an action of debt in Franklin Circuit Court, in which "James Davis, judge of the county court of Franklin county, successor of William Lucas," was plaintiff, and "Michael Dickson and John Davis" were defendants, instituted in 1824, to recover on a bond made by Dickson as principal, and Davis and one Thomas, as his securities, dated in May, 1820, payable to Lucas, as chief justice of the county court of Franklin county, and his successors in office, in the penalty of \$20,000, conditioned, that Dickson, who had been appointed guardian of Nancy Rogers, an infant, should well and truly perform the duties of guardian. The declaration was on the penalty of the bond, without noticing the condition, or assigning special breaches, the usual breach only of nonpayment of the money being alleged. * * *

* * * * *

By Judge TAYLOR. * * * I will, therefore, proceed to examine the reasons assigned on the motion made in the circuit court to arrest the judgment.

The first is, "that there is no cause of action in the plaintiff's declaration." I understand this to mean, and it has been so argued by counsel, that the declaration is insufficient in not setting out the condition of the bond, and assigning breaches thereof. Previous to the statute, 8 and 9 William III, in actions instituted on penal bonds, the plaintiff had judgment and sued out execution for the full amount of the penalty, where a breach of the condition was proved. At that period, suits were always brought, and plaintiffs declared for the amount of the bond; the declaration simply recited the amount for which the bond was given, and averred a breach in the nonpayment of that sum; the

defendant then cravedoyer of the bond and condition, and pleaded performance of the condition; whereupon the plaintiff replied, assigning breaches, upon which the parties went to trial, and if the plaintiff proved a breach of the condition by the defendant, he had judgment and execution for the whole amount of the bond, without regard to the damages, which he really might have sustained. The great injustice which was often done by judgments of this description, induced courts of chancery to interfere at an early day, by injoining the amount of the judgment, except the damages actually sustained. The statute above mentioned, was passed with the single object of enabling courts of law to do that justice, for which a resort to chancery had been necessary. It was not the intention of the framers of the law to vary the remedy further than was necessary to secure the right. Plaintiffs were authorized to assign as many breaches as they thought right, when, before, only one was permitted to be assigned. But the reason of this is obvious. Previous to the statute, the proof of any one breach was sufficient to fix the defendant with the whole amount of the bond, and it would have encumbered the record, and increased the expenses of the suit, by adding more, without producing any corresponding advantage. But after this statute was passed, the recovery was proportioned to the injury, and as every additional breach produced an additional injury, of course it became essential to the plaintiffs right to permit him to assign as many as he could hope to prove. But it was of no importance that he should make this assignment in any way different under the statute, from what had been customary at common law; accordingly we find the statute altogether silent on this subject; and that the practice formerly pursued, is still retained in England.⁹⁹

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99. *Accord*: State *ex rel.* v. Votaw (1846) 8 Blackf. (Ind.) 2; James v. State (1852) 3 Md. 211; Rand v. Rand (1828) 4 N. H. 267; Burkholder v. Lapp's Ex'r (1858) 31 Pa. St. 322.

Contra: Hibbard v. McKindley (1862) 28 Ill. 240.

REED v. DRAKE.

*Supreme Court of New York. 1831.**7 Wendell, 345.*

Error from the New York Common Pleas. Drake sued Reed in the common pleas of New York in the term of August, 1830, and declared in debt on bond, bearing date the 16th June, 1830, for the sum of \$500. The defendant pleaded, 1, *non est factum*. * * *

By the Court, NELSON, J.: * * * The condition of the bond upon which the suit was brought is not set out in the declaration, nor any breaches assigned in it. This was not necessary under the statute of 1813, 1 R. L. 518, sec. 7. *Munro v. Alaire*, 2 Gaines, 327. The assignment might have been made in the replication, if the nature of the plea demanded it; or, if the plea did not demand it, the plaintiff might have suggested them on the circuit or *nisi prius* roll, pursuant to the statute, before trial. 2 Saund. 187, (a), (b); *Tuxbury v. Miller*, 19 Johns. R. 311. The statute of 1813, 1 R. L. 518, sec. 7, was substantially a copy of the English act of the 8th and 9th William 3d, ch. 11, sec. 8; and this court has considered the decisions under this act as applicable to ours. *Munro v. Alaire*, 2 Canes, 329; *Van Benthuyzen v. Dewitt et al.*, 4 Johns. R. 213; *Smith v. Jansen*, 8 id. 115. It was compulsory on the plaintiff to assign breaches, *Van Benthuyzen v. Dewitt et al.*, but he might do so in any of the modes above stated. The revised statutes have changed the law in this particular. It is now enacted, "when an action shall be prosecuted in any court of law, upon any bond, for the breaches of any condition other than the payment of money, etc., the plaintiff, in his declaration, shall assign the specific breaches for which the action is brought." 2 R. S. 378, § 5. This differs from the law of 1813, the seventh section of which provided that in all actions, prosecuted in any court of record, upon any bond, etc., "the plaintiff shall assign as many breaches as he may think fit," etc., but does not direct it to be done in the declaration. The revised statutes undoubtedly intended to abolish the different modes of assigning breaches by the plaintiff in actions of this kind, which had grown up under the

act of 8th and 9th William 3d, and adopted under ours, and to make it compulsory on the plaintiff to assign them in the declaration. This alteration is an improvement of the law, by simplifying and abridging the pleadings and diminishing the costs. As under the statute of 1813, it was compulsory on the plaintiff to assign breaches in some one of the different modes authorized, if he sought to recover anything beyond nominal damages on bonds within the statute, so now, under the revised statutes, he must assign the breaches in the declaration, if he seeks to recover beyond nominal damages.

* * * The judgment must be reversed, the costs to abide the event, and a *venire de novo* must issue. No doubt the court below will allow the plaintiff to amend his declaration on terms.¹

1. In *State v. Caffee* (1833) 6 Ohio, 150, a statute open to such construction was held to require the assignment of breaches in the declaration, for the reason that this seemed to the court much more convenient practice.

(5) Contracts in Writing.

ANONYMOUS.

Court of King's Bench. 1702.

2 Salkeld, 519.

If an Act of Parliament makes writing necessary to a common-law matter, where it was not necessary by the common law, you need not plead the thing to be in writing, but give it in evidence, but where a thing is originally made by Act of Parliament, and required to be in writing, you must plead it with all the circumstances required by the act; as upon the statute of H. 8 of Wills, you must plead a will to be in writing; but a collateral promise, which is required to be in writing by the statute of frauds, you need not plead to be in writing, though you must prove it so in evidence. Per HOLT, C. J.²

2. *Accord*: *Fiedler v. Smith* (1850) 6 Cush. (Mass.) 336.

Exception: "As to the rule under consideration, however, a distinction has to be taken between a *declaration* and a *plea*; and it is said, that though in the former the plaintiff need not show the thing to be in writing, in the latter the defendant must."—Stephen on Pleading (Tyler's Ed.) 331.

REID v. STEVENS.

Supreme Judicial Court of Massachusetts. 1876.

120 Massachusetts, 209.

Contract for services rendered by the plaintiff to the defendant. The declaration alleged that the defendant made with the plaintiff "a certain contract in writing." Answer, a general denial.

At the trial in the superior court, before BACON, J., the plaintiff put in evidence, to prove the contract declared upon, a diary * * * in which was written in the defendant's handwriting * * * [the contract alleged].

The signature of the defendant was not attached to the writing, and his name nowhere appeared in the book containing it. * * *

GRAY, C. J.: The allegation in the declaration, that the defendant made a contract in writing, was denied in the answer, and was not supported by evidence of a contract not signed by the defendant. The objection of variance was open to the defendant, although he had not set up the statute of frauds. The case is thus distinguished from *Middlesex Co. v. Osgood*, 4 Gray, 447.

Exceptions sustained.

REED v. SCOTT.

Supreme Court of Alabama. 1857.

30 Alabama, 640.

[Action upon a promissory note.]

On the trial it appears from the bill of exceptions, the plaintiff offered in evidence an instrument in writing which corresponded in every respect with that described in the complaint, except that it was under seal. The defendants objected to its admission, on account of this variance; and the court sustained the objection. * * *

WALKER, J.: The distinction between sealed and unsealed instruments is not altogether destroyed by the Code. To

the word promissory note the law attaches a distinct meaning, which does not include a bond, or instrument under seal. Under the mercantile law and the Statute of Anne, it was held, that the instrument's being under seal deprived it of its character of a promissory note, and, consequently, of its negotiable character. *Sayre v. Lucas*, 2 Stewart, 259; *Clark v. F. M. C. of Benton*, 15 Wendell, 256; 1 Chitty on Pl. 15; Story on Bills 76, § 61; Story on Prom. Notes, 56, § 55; *Farmers' & Mechanics' Bank of Phila. v. Geriner*, 2 S. & R. 114. A bond is sometimes designated as a note *under seal*, and bill single is sometimes used to designate indiscriminately an instrument without condition, whether with or without seal. 5 Com. Digest, 194, Obligation, C.; Bouvier's Law Dic., Bill Single. But a bond cannot, with strict legal propriety, be termed a promissory note; and they have always been distinguishable in the incidents which attach to them. The instrument sued upon, being described as a promissory note, was not the instrument offered in evidence, because the latter is a bond. The court did not, therefore, err in the rejection of the evidence when offered.

* * * * *

PHILLIPS v. SINGER MANUFACTURING COMPANY.

Supreme Court of Illinois. 1878.

88 Illinois, 305.

BREESE, J., delivered the opinion of the court.

This was debt on a bond with conditions, brought to the circuit court of Tazewell county, by the Singer Manufacturing Company, plaintiff, and against William H. Phillips, Lewis D. Lawton and Jeremiah B. Phillips, defendants.

* * * * *

Several points are made by appellants. The first is, the court should not have admitted the bond in evidence, on account of a variance between the bond described in the declaration and the one offered in evidence. The averment in the declaration is, that defendant made and executed their bond to "the Singer Manufacturing Company;" the bond offered in evidence is a bond executed to that company

and Everhard & Harris, of Peoria, Illinois. In the declaration the Singer Manufacturing Company is alleged to be the sole obligee in the bond, whereas the bond shows that Everhard & Harris were joint obligees with that company, and the principle is well settled that all the obligees or payees having a legal interest must join in an action upon the instrument. Here the allegation and proof did not correspond. While the declaration alleged the bond as made payable to the Singer Manufacturing Company, the bond in evidence showed it was made not only to that company, but to Everhard & Harris, and they should have joined in the action. Where a bond, upon its face, denotes the parties to it, the action must be between the parties to it, no matter what may be the terms of the defeasance. It was error to admit this bond in evidence.³

* * * * *

3. In *King v. Despard* (1830) 5 Wend. (N. Y.) 276, the plea justified by an execution alleged to have been returnable in 90 days; and proof of an execution returnable in 60 days was held to be a fatal variance. In *Salter v. Richardson* (1826) 3 T. B. Mon. (Ky.) 204, a bond was declared on as dated 1821, stipulating for the payment of a certain sum, and the evidence showed a bond dated 1823 stipulating for the payment of said sum *with interest from date*; held to be a fatal variance in both particulars. In *Hoar v. Mill* (1816) 4 M. & S. 470, plaintiff declared on a demise of a wharf and storehouses, while the deed used only the word "storehouse," and it was held that the variance was fatal.

VAN SANTWOOD v. SANDFORD.

Supreme Court of New York. 1815.

12 Johnson, 197.

SPENCER, J., delivered the opinion of the court. The demurrer to the fourth count is well taken; the action is covenant, and it cannot be maintained but on a deed. The only averment or allegation of a deed is "and hereupon the defendant, on the 24th day of March, in the year aforesaid, entered into a guaranty, covenant, and agreement in the words and figures following:" then the agreement is set out *in haec verba*, with a conclusion, that it was signed and sealed with the name of the defendant and the *locus sigilli*, purporting to be a literal copy of the agreement.

It must appear that the contract was under seal, and the law will not intend that it was sealed, unless it be expressly

averred to be so; and though the bond or deed, upon oyer, recite, "in witness whereof we have hereunto set our hands and seals," yet that does not amount to an averment, but that the party must show that the bond or deed was actually sealed by the other. These principles will be found in *Cabel v. Vaughan* (1 Saun. 291, note 1), where all the cases are carefully and accurately collected. There are some words of art, such as indenture, deed, or writing obligatory, which, of themselves, import that the instrument was sealed; but if it be alleged that J. S., by his certain writing, demised or covenanted, without averring that it was sealed, the court will not intend that the writing was sealed. (Cro. Eliz. 571; Ld. Raym. 2537; 8 Com. Dig. Fait. (A. 2) Pleader, 2 W. 9. 14.)

* * * * *

Judgment for the defendant, with leave to amend on the usual terms.

(k) *Facts Showing Tort Liability.*

(1) Plaintiff's Right and Defendant's Duty.⁴

McANDREWS v. THE CHICAGO, LAKE SHORE & EASTERN RAILWAY COMPANY.

Supreme Court of Illinois. 1906.

222 Illinois, 232.

HAND, J., delivered the opinion of the court:

This is an action on the case brought by the plaintiff, against the defendant, in the superior court of Cook county,

4. The plaintiff's right and the corresponding duty resting upon the defendant do not always require express averment, because they are sometimes presumed and sometimes appear as incidental to allegations of title. Thus, in *trespass for assault and battery*, the right to be free from personal molestation is an absolute right, which the law presumes, and no special facts disclosing it are required. So in *fraud and deceit*, the right of the plaintiff "not to be induced by fraud to assent to a transaction which causes him damage" (Holland: Jurisprudence (9th Ed.) 223) is an absolute one, and this right, together with the duty of the defendant to observe it, is always presumed by law and hence need not be shown in the pleading; except where the fraud consists in concealment of facts which ought to be disclosed because of a relation of trust and confidence, in which case the existence of such relation not being presumed, must be alleged (*Feeney v. Howard* (1889) 79 Cal. 525). In *trespass to property, trover and nuisance* the right and duty appear as incidents of the title which the plaintiff alleges in himself.

to recover damages for a personal injury alleged to have been sustained by the plaintiff while in the employ of the Illinois Steel Company at its South Chicago plant on the 16th day of July, 1901, by reason of certain cars being thrown by a locomotive engine under the control of the servants of the defendant, against a car which the plaintiff was unloading, whereby the plaintiff was thrown to the ground and run over and severely injured. The jury returned a verdict in favor of the plaintiff for the sum of \$12,000, upon which the court, after overruling a motion for a new trial and in arrest of judgment, rendered judgment, which judgment, upon appeal by the defendant, was reversed by the branch of the appellate court for the first district and a judgment in that court was rendered in favor of the defendant and the plaintiff has sued out a writ of error from this court to review that judgment.

* * * * *

The original declaration charges the plaintiff was in the employ of the Illinois Steel Company at its plant at South Chicago, at which plant there were certain railroad tracks; that while the plaintiff was upon and about to unload a certain car standing upon one of said tracks, and while he was exercising ordinary care and caution for his own safety, the servants of the defendant "then and there recklessly, negligently and without giving the plaintiff any warning, shoved certain other cars against the said car upon which the plaintiff was standing." The criticism made upon the original declaration is, that it does not aver facts showing the defendant owed the plaintiff the duty to notify him that it was about to move the cars which came in contact with the car upon which he was at work, prior to the time it moved said cars, and it is said that although the defendant recklessly and negligently shoved said cars against the car upon which plaintiff was at work, the defendant is not liable to him for a resulting injury therefrom unless it owed him a duty to warn him that it was about to move said cars, prior to the time they were moved, and that it is not averred in the original declaration that the defendant knew, or ought to have known, the plaintiff was upon said car, nor are facts averred from which it appears that a duty rested upon the defendant to anticipate the presence of the plaintiff upon or in proximity to the car with which the moving cars come in contact. In actions of the character

of this it is necessary to aver and prove three elements to make out a cause of action: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure of the defendant to perform that duty; and (3) an injury to the plaintiff resulting from such failure. When these three elements concur they unitedly constitute actionable negligence, and the absence of any one of these elements, either in the declaration or proof, renders the declaration insufficient to sustain a judgment for negligence, even after verdict or the proof to establish a cause of action involving actionable negligence (*Schueler v. Mueller*, 193 Ill. 402; *Mackey v. Northern Milling Co.*, 210 id. 115; *Faris v. Hoberg*, 134 Ind. 269; 33 N. E. Rep. 1028); and it is not sufficient in the declaration to allege that it is the duty of the defendant to do certain things, as that would be but the averment of a conclusion, but the declaration must state facts from which the law will raise the duty. *Ayers v. City of Chicago*, 111 Ill. 406; *Chicago and Alton Railroad Co. v. Clausen*, 173 id. 100; *Schueler v. Mueller*, *supra*.

In *Schueler v. Mueller*, *supra*, an action on the case was brought against the city of Chicago and the appellants to recover damages for a personal injury claimed to have been sustained by the appellee by falling through a trapdoor in a sidewalk upon one of the streets in the city of Chicago. The case was dismissed as to the city, and the appellants, who did not appear, were defaulted, and a jury were sworn, who assessed the plaintiff's damages, upon which verdict a judgment was rendered. During the term at which the judgment was rendered the appellants moved to set aside and vacate the judgment. There was a failure to state in the declaration any facts showing how or why it was the duty of appellants to care for and guard the trapdoor in the sidewalk, and this court held, by reason of the lack of such averment the declaration failed to show any duty from the defendants to the plaintiff to maintain and keep in safe condition said trapdoor, and that by reason of such omission the declaration failed to state a cause of action, and that the want of such averment in the declaration was not cured by verdict.

And in *Mackey v. Northern Milling Co.*, *supra*, an action was brought to recover damages for the alleged negligence of the milling company, which, it was averred, resulted in

the death of the plaintiff's intestate. It was averred that the appellant's intestate was in the milling company's employ; that he was lawfully on the sidetrack of the company when injured, and was in the exercise of due care for his own safety, when the milling company's servants, not the fellow-servants of said intestate, pushed an unloaded car along said sidetrack and upon said intestate without giving him any notice or warning of its approach, whereby he was injured, etc. The declaration failed to state that said intestate's duties necessarily required him to be on the sidetrack at the time and place where he was injured, or that he was performing any duty he owed the milling company at that time and place, or that said company had any reason to believe or suspect that he would be at that place at the time of said injury, and it was held the declaration, for want of such averments, was so defective that it would not support a judgment. The court said (p. 118): "In the absence of averments showing that appellee (the milling company) owed Mackey (the intestate) some duty which was violated, and because of such violation said Mackey was injured while in the exercise of due care, the declaration must be held not to state a cause of action."

In this case, the only ground upon which the defendant could be held liable for actionable negligence in injuring the plaintiff would be that it owed the plaintiff a duty not to run its cars against the car upon which he was at work, without giving him warning of the approach of said cars in time for him to reach a place of safety before the cars collided, and that it neglected to perform such duty. There is found in the original declaration no averment of fact from which a duty to give the plaintiff such warning arises. It does not appear from the averments of the original declaration that the defendant knew, or was bound to know, that the plaintiff was on said car or in its vicinity, or that he was likely to be injured by the car upon which he was at work being moved by the cars being handled by the servants of the defendant. The original declaration therefore fails to show that the defendant owed the plaintiff any duty not to throw the cars being moved by its engine against the car upon which he was at work, without giving the plaintiff timely warning. The declaration, therefore, in that regard was fatally defective. In *Mackey v. Northern Milling Co.*, *supra*, on page 117, it was said: "It is a well-

established rule that a declaration, in cases of this character, must state facts from which the law raises a duty from the master to the servant, and if the declaration fails in this regard then it is insufficient to support a judgment. As stated in *Ayers v. City of Chicago*, 111 Ill. 406, 'the pleader must state facts from which the law will raise the duty.' And as said in *Cooley on Torts* (2d Ed), 791: 'The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed.' And Mr. Thompson, in his work on Negligence (2 Thompson on Negligence, 1244), says: 'Unless the duty results in all cases from the stated facts, the declaration so framed will be bad.' " And in *Schueler v. Mueller*, *supra* (p. 403): "It is not sufficient in a declaration to allege generally the duty of the defendant, but the pleader must state facts from which the law will raise a duty, and show an omission of the duty and a resulting injury."

We think the original declaration stated no cause of action. * * *

It is, however, urged, that a duty from the defendant to the plaintiff should be implied from the averment found in the original declaration that the cars were recklessly and negligently shoved against the car upon which the plaintiff was at work. A person may be guilty of a negligent or reckless act and still not be liable for actionable negligence. Liability only follows a negligent or reckless act when the party guilty of the act owes to the party injured some duty which is violated by the commission of the negligent or reckless act. Thompson on Negligence (vol. I, sec. 3) says: "Where there is no legal duty to exercise care there can be no actionable negligence. Therefore it is reasoned that a plaintiff who grounds his action upon the negligence of the defendant must show not only that the conduct of the defendant was negligent, but also that it was a violation of some duty which the defendant owed to him." And in *Bishop on Non-Contract Law* (par. 446) it is said: "To sustain an action for negligence the plaintiff must have suffered a legal injury whereof he is entitled to complain. Therefore, however great the defendant's negligence, if it was committed without violating any duty which he owed, either directly to the plaintiff or to the public, in a matter whereof he had the right to avail himself, * * * there is nothing which the law will re-

dress.” * * * It would appear to be clear that the averment, therefore, that the defendant shoved said cars negligently and recklessly does not supply the want of an averment of facts showing that the defendant owed to the plaintiff a duty not to move said cars without notice to him.

* * * * *

Finding no reversible error in this record the judgment of the appellate court will be affirmed.

SEYMOUR v. MADDIX.

Court of Queen's Bench. 1851.

16 Adolphus & Ellis, New Series, 326.

CASE. The declaration stated that the defendant was possessed of a certain theatre, to-wit, the Princess' theatre, etc., and of a certain stage therein, on which operas and other dramatic entertainments were performed, and of a certain dressing room therein, known as the dressing room of the male chorus singers, and of a certain floor therein underneath the said stage, called the Mazarine floor, in which floor was a certain cut or hole of great depth, etc., across and along which said floor persons performing at and in the theatre, in operas and other dramatic entertainments, were accustomed, before, during, and after the performance thereof, to pass from and to the said dressing room to and from the back of the stage. That defendant had hired plaintiff to act, sing, and perform as a chorus singer at the theatre on the said stage, for reward in that behalf. That plaintiff, on 31st May, 1848, did act, sing, and perform at the said theatre on the stage under such hiring as aforesaid, in a certain opera called the Crown Diamonds, which opera was then and there performed under the management and for the profit of the defendant. That it then became and was the duty of the defendant to cause the said mazarine floor to be so sufficiently lighted, and the said cut or hole to be so fenced, guarded, or secured, before, during, and until after the lapse of a reasonable time from the termination of, the said performance, as to prevent any accident or injury to persons passing across and

along the Mazarine floor from and to the dressing room to and from the back of the stage. That the defendant, well knowing the premises, suffered and permitted the Mazarine floor to be insufficiently lighted, and the cut or hole to be open without any sufficient fence, guard, or security, before, during, and until after the lapse of a reasonable time from the termination of, the performance. By reason of which insufficient lighting as aforesaid, and of the cut or hole being so as aforesaid open without any sufficient fence, guard, or security, the plaintiff, who was then, within a reasonable time from, to wit, immediately after the termination of the performance, passing from the back of the stage across and along the Mazarine floor to the dressing room, fell into and down the cut or hole, and thereby was then grievously bruised and injured, etc.

Pleas, among others, not guilty, and a traverse of the alleged duty. Issues thereon.

On the trial, before ERLE, J., at the Middlesex sittings after last Trinity term, the verdict was for the plaintiff.

Chambers, in last Michaelmas term, obtained a rule *nisi* to arrest the judgment, on the ground that the declaration showed no such duty to light and fence the hole as alleged.

* * * * *

LORD CAMPBELL, C. J.: I am of opinion that judgment in this case must be arrested. The duty, a breach of which is laid, does not arise from the particular facts stated in the declaration nor from the general relation of master and servant. What, then, is the effect of the positive allegation of such duty? I confess that I, at first, thought that where a relation, from which a particular duty may arise, is alleged, and the particular duty is also alleged, it might be shown in evidence that, in fact, such a duty did arise, and that it was unnecessary to set forth the facts themselves which raise the duty. But the decisions show that the allegation of duty is in all cases immaterial, and ought never be introduced; for, if the particular facts raise the duty, the allegation is unnecessary, and, if they do not, it will be unavailing. In this case there is an allegation that it was the defendant's duty to light the floor and fence the hole, but no facts are stated from which the duty arises. The express allegation, therefore, will not help the defect, and the declaration is bad.

* * * * *

ERLE, J.: The allegation of duty is an allegation of mere matter of law; and it is necessary to state facts from which the duty which is charged to be broken arises. If the facts are insufficient for this purpose, the allegation of duty will not help. Here it is stated that the defendant held a theatre in which he hired the plaintiff to perform, that on part of the premises there was a hole in the floor along which the plaintiff had to pass in discharge of his duty as a performer, and that it was the duty of the defendant to light the floor sufficiently, so as to prevent accidents to those who had to pass along it. Was any such duty cast upon the defendant? I think not. A person must make his own choice whether he will accept employment on premises in this condition; and, if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark or carry a light. If he sustain injury in consequence of the premises not being lighted, he has no right of action against the master who has not contracted that the floor shall be lighted. I confine my judgment to this ground, that the declaration does not show any contract that the premises should be in any particular state with respect to lighting and fencing, or that there was any misfeasance.

Rule absolute.

AYERS v. CITY OF CHICAGO.

Supreme Court of Illinois. 1884.

111 Illinois, 406.

DICKEY, J., delivered the opinion of the court.

We find no error in the judgment of the appellate court. The judgment of the superior court of Cook county was properly affirmed. The only question of law presented by the record relates to the propriety of the instruction directing the jury to find for the defendant, upon the ground stated in the instruction—that “there is no evidence to sustain the material allegations of the plaintiff’s declaration.”

The gist of the complaint, as stated in the declaration, is, that the defendant was in possession and occupancy of

premises adjoining a public highway, and that on these premises so adjoining the public highway and so possessed by the defendant was a dangerous pit, and that by reason of such possession and occupancy of the pit so situate, it was the duty of the defendant to protect the public against liability to injury by falling into the pit, by covering the same, or otherwise guarding against the danger, and that defendant failed to perform that duty. A plaintiff cannot recover except by proof of the case stated in his declaration. The *probata* must support the *allegata*. It does not tend to support the allegations of this declaration to furnish proof tending to show that defendant was possessed of a public street frequented by the public, and by reason of the possession of the public street it became the duty of defendant to make and keep this public highway in a safe condition, and in violation of this duty it had negligently permitted a dangerous pit adjoining such highway to be and remain without any barrier to protect persons passing from falling therein; nor does proof tending to show a negligent failure of the defendant to keep such highway so in its possession safe, by permitting to be and remain in said highway a dangerous pit wholly unguarded by any barrier—and this, for the reason the declaration charges defendant with no such duty. It is not necessary here to decide whether proofs given would have made it the duty of the court to have submitted the case to the jury under a declaration charging the case which the proofs are supposed to sustain. It is enough that the proofs utterly fail to tend to show that defendant was in possession of the premises outside of and adjoining a public highway where it is alleged this dangerous pit was. This allegation cannot be treated as surplusage. Without it the declaration shows no cause of action. It is not sufficient, in a declaration, to say, generally, that it was the duty of defendant to cover or otherwise protect a dangerous place. The pleader must state facts from which the law will raise the duty. Such duty in relation to this pit may arise from the fact, if it be so, that the defendant excavated the pit. Such duty may rest upon one in possession and occupancy of such pit. Such duty may rest upon a city occupying a street adjoining such pit, upon the ground that the position of the pit renders the street unsafe; and if the pit be in the street,

the duty may rest upon the city to keep covered and protected all dangerous pits located in the streets. On these questions we need not here pass. What we rule is, that under a declaration charging defendant with the duty of covering or protecting a dangerous pit, upon the allegation that the pit is located on premises occupied by defendant and adjoining a public highway, plaintiff cannot recover by proving that defendant is in possession of the highway, and as occupant of the highway owes that duty to the public, whether the pit be in the highway or adjoining the highway.

The judgment of the appellate court is therefore affirmed.

Judgment affirmed.

BLOSS v. TOBEY.

Supreme Judicial Court of Massachusetts. 1824.

2 Pickering, 320.

PARKER, C. J.: It is with great regret, and not without much labor and research to avoid this result, that we are obliged to arrest the judgment in this case for want of a sufficient count to support the verdict. If anyone could be supported there would be no difficulty in applying the verdict to it, since we are informed by the judge, and the nature of the case shows, that the same evidence would suit equally well all the counts in the writ. The words for which the action was brought, as described in the several counts, are substantially the same.

The first count only charges the defendant with having said that the plaintiff had burnt his own store in Alford. The words are introduced with a colloquium "of and concerning the plaintiff and of and concerning a certain store of the plaintiff's, situated in said Alford, before that time, to wit, on the sixth day of December last past, consumed by fire," and alleges that the defendant did speak, utter and publish the following false, scandalous and malicious words of and concerning the plaintiff, viz.: He (meaning the plaintiff) burnt it (meaning the plaintiff's store in Alford aforesaid) himself (again meaning the plaintiff); and fur-

ther meaning and insinuating by the several words aforesaid, that the plaintiff had been guilty of the crime of wilfully and maliciously burning his own store in Alford aforesaid." Now these words are not actionable, unless it is a crime punishable by law for a man to destroy by fire his own property; and we cannot find that, either by the common law, or by any statute of this commonwealth, such an act, unaccompanied by an injury to, or by a design to injure, some other person, is criminal; and although it is alleged by the innuendo, that the defendant meant and intended to charge the plaintiff with having done this act wilfully and maliciously, yet the words do not thereby acquire any force or meaning which they had not in themselves, the office of an innuendo being only to make more plain what is contained in the words themselves as spoken, not to enlarge or extend their meaning or give them a sense which they do not bear when taken by themselves without the aid of an innuendo. The words spoken, as stated in this count, are simply, "He burnt it." These words are innocent in themselves, though they may have a defamatory meaning, if they relate to any subject the burning of which is unlawful. In order to give them that character, that they may be actionable, the plaintiff should have set forth in a colloquium the circumstances which would render such a burning unlawful, or by an averment in the preceding part of his count, without the form of a colloquium, and then should have averred that the words spoken were of and concerning those circumstances. Thus, if goods belonging to another person were in the store, or if goods belonging to the plaintiff had been insured, it should have been averred that such was the case, and that the words spoken related to a store with such goods in it. But there is nothing in the count which indicates that any goods were in the store, or that any damage had happened or was designed towards anyone but the plaintiff himself; so that the whole accusation against him, as represented in this count, is that he wilfully and maliciously burnt his own store.

The second count is equally defective. The words as stated in the count, without the innuendoes, are, "There is no doubt in my mind that he burnt it; he would not have got his goods insured if he had not meant to burn it." These words, without a colloquium, or some averment in the count to which they may be referred, are wholly sense-

less. They are alleged to have been spoken of and concerning the plaintiff, but that alone does not make them more intelligible; and there is nothing in the count to show what it is that was burnt, whether a dwelling house, ship or store, or whether any goods were actually insured or not. But as in the innuendo in this count the defendant is stated to have meant "the plaintiff's store aforesaid," this count may be helped by referring to the colloquium in the first count, so that the charge may be taken to be, that the plaintiff had burnt his own store in Alford, which had before that time been consumed by fire. This, however, leaves the second count in the same predicament with the first, except that the words are, "there is no doubt in my mind that he burnt it," instead of the more direct charge, "He burnt it." There is here no charge of any crime or offence, there being no prohibition in the law against a man's burning his own store, if no one be injured or endangered thereby. It is, however, further added in this count, that in connection with the words, "There is no doubt in my mind he burnt it," the defendant said, "He would not have got his goods insured if he had not meant to burn it." Had there been any colloquium in this or the preceding count, relative to goods in the store which had been insured, the action might have been saved on this count; but there is no such colloquium. The count, therefore, with the aid of the colloquium, stands thus: "There is no doubt in my mind that he burnt his store in Alford, he would not have got his goods insured if he had not meant to burn it." What goods? may be asked; and where were they? No answer can be given from the declaration, and therefore there is nothing to show that the burning the store, if the charge was true, was criminal. The innuendo, it is true, makes the application of these words, by stating that the defendant meant thereby certain goods which the plaintiff had previously procured to be insured, and which were lodged in the said store; but the difficulty is, that this matter is not proper to be alleged by an innuendo, the office or use of which, according to all the authorities, is not to enlarge or add anything to, but to make more clear by explanation, the sense of words averred to have been spoken.

* * * * *

i.

* * * The words must be averred to have been spoken of and concerning the plaintiff, and of his trade, profes-

sion or occupation, if he is slandered in those respects, and where the words standing by themselves have no sense or meaning, but with reference to some particular subject are slanderous, there must be a colloquium or averment, setting forth that subject, and an apt reference to it, showing that the words spoken were of and concerning it. Examples are too numerous in the books of pleading to make it necessary to quote any of them here.

The case of *Rex v. Horne*, decided in the House of Lords, as reported in Cowper, 672, has settled the doctrine; and the opinion of all the judges as delivered by Lord Chief Justice DEGREY, was calculated, by its sound sense and able commentary upon technical rules, to put at rest all questions upon the subject in England. He says, "As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed, must be set out; and all beyond are surplusage." "Where the circumstances go to constitute a crime they must be set out." Where the crime is a crime independently of such circumstances, they may aggravate, but do not contribute to make the offense." "If the terms of a writing are general, or ironical, or spoken by way of allusion or reference, although every man who reads such a writing may put the same construction upon it, it is by understanding something not expressed in direct words; and it being a matter of crime, and the party liable to be punished for it, there wants something more. It ought to receive a judicial sense, whether the application is just; and the fact, or the nature of the fact, on which that depends, is to be determined by a jury. But a jury cannot take cognizance of it, unless it appears upon the record; which it cannot do without an averment."

This is certainly giving a very sensible and intelligible reason for the use of colloquiums in actions for slander, for the same doctrine is undoubtedly applicable to actions for words, as to actions or indictments for libels. It is founded upon the necessity of certainty in the declaration, and that is one of the first requisites in pleading.

With respect to the manner of putting upon the record those facts and circumstances which tend to render the words actionable, the same great judge says, it must be by averments in opposition to argument and inference, by way of introduction, if it is new matter, and by way of innuendo, if it is only matter of explanation, for an innuendo means

nothing more than the words, "*id est*," "*scilicet*," or "meaning," or "aforesaid," as explanatory of a subject-matter sufficiently expressed before; as such a one, meaning the defendant, or such a subject, meaning the subject in question. He then refers to *Barham's case*, in Coke, which is cited in all the books in illustration of this doctrine. "He has burnt my barn, meaning a barn full of corn." This is bad, because what comes in under the innuendo is an addition to, and not an explanation of the words spoken; though had there been in a preceding count referred to in this, a colloquium respecting the plaintiff's barn, full of corn, which had been burnt, the innuendo, by reference to the colloquium, would have been holden good. *Vid. Tindall v. Moore*, 2 Wils. 114. The case of *Barham v. Nethersall*, is better reported in Yelverton, 22, where it is said, "if the words before the innuendo do not sound in slander, no words produced by the innuendo will make the action maintainable; for it is not the nature of an innuendo to beget an action."

Now let the second count in the declaration be tried by these principles. It is very clear, as before stated, that without the innuendo there is not sufficient matter averred. The words are, as aided by the colloquium in the first count, "There is no doubt in my mind that he burnt his store in Alford; he would not have got his goods insured if he had not meant to burn it." This amounts to a direct charge of his having burnt the store, and an insinuation of a motive; but still it imports no crime unless the goods were in the store, or unless the plaintiff meant to avail himself of his insurance by defrauding the underwriters by means of the fire. It ought to appear somewhere in the shape of an averment of some kind, and not by argument or inference, that goods in the store, or connected with it, were insured. This does nowhere appear except in the innuendo. The words of that are, "Meaning goods which the plaintiff had caused to be insured and which were lodged in said store." Is this new matter added to the words, or is it merely an explanation of their sense?

Clearly the former, because the words contained in the count are not capable of such a construction by themselves. The matter in the innuendo is a new fact not appearing before in any shape. The count contains an insinuation only; and it is not possible, by any mode of reasoning, to

infer from anything contained in it, as a fact, that the plaintiff had goods in his store which were insured.

The general counts are decidedly bad, for they contain nothing more than the allegation, that the defendant said of the plaintiff, he had burnt his own store; which, for the reason before given, is not actionable.

The judgment must therefore be arrested. If the plaintiff has suffered a serious injury, another action may give him indemnity. In a matter of technical law, the rule is of more consequence than the reason of it; and however we may lament the lost labor and expense of the suit, we find ourselves wholly unable to prevent it.

Judgment arrested.

(2) Invasion of Right and Breach of Duty.

SANFORD v. GADDIS.

Supreme Court of Illinois. 1853.

15 Illinois, 229.

TREAT, C. J.: This was an action for slander, brought by Sanford against Gaddis. The declaration alleged that the defendant said of the plaintiff, in reference to testimony given by him as a witness in a judicial proceeding, "You swore false." The proof was, that the defendant said of the plaintiff, immediately after he had testified as a witness in the case referred to, "You have sworn false." The court excluded the evidence on the ground of variance; and that decision is assigned for error.

It is a well-established rule in actions for slander that the allegations and proofs must agree. The plaintiff must prove the words alleged in the declaration or so much of them as will sustain his cause of action. It is not enough to prove other words of like import and meaning. Equivalent words or expressions will not suffice. All of the words averred need not be proved, unless it takes all of them to constitute the slander. And proof of additional words will not vitiate, unless they so qualify the words alleged as not to amount to the slanderous charge. For example: "If

the words laid are, "He stole a large amount of money," the action is sustained by proof of the words, "He stole money." The words proved are those alleged, and they are of themselves actionable. So if the words laid are, "He is a thief," the declaration is supported by proving the words "He is a thief, for he stole money." The words alleged are proved, and their sense is not varied by the additional words. But if the words laid are, "He is a thief," proof of the words, "He is a thief, for he bought the property and refused to pay the price," will not sustain the action. The additional words so qualify those alleged as not to impute the crime of larceny. A count for words spoken affirmatively is not sustained by proof of words spoken in the way of interrogatory. And proof of words spoken to a person will not support a count for words spoken of a person. *Maitland v. Goldney*, 2 East, 426; *Rex v. Berry*, 4 Durnford & East, 217; *Barnes v. Holloway*, 8 id. 150; *Opwood v. Barks*, 4 Bingham, 261; *Johnson v. Tait*, 6 Binney, 121; *Fox v. Vanderbeck*, 5 Cowen, 513; *Olmsted v. Miller*, 1 Wendell, 506; *Williams v. Bryant*, 4 Alabama, 44; *Easley v. Moss*, 9 id. 226; *Wheeler v. Robb*, 1 Blackford, 330; *Linville v. Earlywine*, 4 id. 469; *Crulman v. Marks*, 7 id. 281; *Watson v. Meesick*, 2 Missouri, 29; *Berry v. Dryden*, 7 id. 324; *Slocum v. Kaykendall*, 1 Scammon, 187; *Patterson v. Edwards*, 2 Gilman, 720.

In this case, the words proved, under the circumstances of the speaking, had the same meaning as those laid in the declaration, and equally imputed the crime of perjury. But they were not the same words. They were at most only equivalent words. They were not in themselves actionable. There was a clear variance between the words laid and those proved, and the court was right in excluding the evidence from the jury.

The judgment must be affirmed.

Judgment affirmed.

NESTLE v. VAN SLYCK.

Supreme Court of New York. 1842.

2 Hill, 282.

By the Court, BRONSON, J.: Although the declaration is but a clumsy performance in the way of special pleading, I am inclined to think it sufficient after verdict. The objections to it are. 1. The want of an averment that the words were spoken of and concerning the plaintiff. * * *

In actions for verbal slander, the usual course is, to allege a colloquium of and concerning the plaintiff, and then to follow it by an averment that the words were spoken of and concerning the plaintiff. The pleader in this case has, in all the counts, stated a discourse of and concerning the plaintiff, but he has not followed it by an averment that the words were spoken of the plaintiff. It was thought at an early day that the laying of a colloquium of the plaintiff was indispensable in all cases. But in *Smith v. Ward* (Cro. Jac. 674), it was held, on a motion in arrest of judgment, that the omission of the colloquium was not fatal where the words were alleged to have been spoken of the plaintiff, and their application to him was sufficiently apparent. The declaration in that case was, that the defendant said of the plaintiff, "He" (innuendo the plaintiff) "is a thief." This was held sufficient after verdict; and would now, I think, be held good on demurrer. (See 1 Chit. Pl. 432, ed. of '37; 2 id. 306, 7, note (g), ed. of '19; Stark. on Slander, 283, 4.)

The pleader in this case had laid a colloquium, but he has omitted the more important averment that the words were spoken of and concerning the plaintiff. These words, says Mr. Chitty, are very material. (2 Chit. Pl. 312, n. (g), ed. of '19.) But in a subsequent edition he says, "the declaration must show by a colloquium, or otherwise, that the words were spoken, or the libel was composed and published, of and concerning the plaintiff." (1 Chit. Pl. 432, ed. of '37; 2 id. 623, notes (d) and (1); and p. 635, note (w).) And upon principle it would seem to be sufficient, especially after verdict, that it appears in any way that the slanderous words were spoken of the plaintiff. This has

undoubtedly been regarded as an indispensable averment. (Com. Dig. Defam. G. 7.) But Serjeant Williams, who is good authority, thinks it enough, after verdict, that a colloquium concerning the plaintiff is laid, without any more direct averment that the words were spoken of the plaintiff. Indeed, he thinks the defect should be pointed out by special demurrer. (1 Saund. 242, note (3). And see Stark. on Sland. 284, 5.) But, however that may be, if it appears with reasonable certainty on looking at the whole count, that the words were spoken of the plaintiff, that must be enough after verdict, although the averment is not made in the most skillful manner.

* * * * *

WARE v. CARTLEDGE.

Supreme Court of Alabama. 1854.

24 Alabama, 622.

LIGON, J.: The demurrer to the declaration, and to each count of it, was correctly overruled. The only objection taken to it as a whole, or to any of its several counts, is, that in that portion of it in which the speaking and publishing of the slanderous words is averred, they are averred to have been spoken in the presence of a person whose name is left blank. The words spoken are actionable in themselves, and it is sufficient to aver that they were spoken and published of and concerning the plaintiff. This averment necessarily implies the presence of some one, to whom, or in whose presence, publicity was given to the charge. The name of such person, if set forth in the declaration, would not render it necessary for the plaintiff to prove that the words were spoken to him, or in his presence, before she would be entitled to recover; but if the testimony showed that they were spoken to another and a different individual, it would suffice. The injury complained of is, not that the defamatory words were spoken to this or that individual, but that publicity had been maliciously given by the defendant to a false charge against the plaintiff. *Taylor v. How*, Cro. Eliz. 861; *Starkie on Slander*, 460.

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BOTTOMLY v. BOTTOMLY.

*Court of Appeals of Maryland. 1894.**80 Maryland, 159.*

BRYAN, J., delivered the opinion of the court.

As this case comes before us, the declaration contains only one count, and the question of its sufficiency is presented by a demurrer. This demurrer was sustained by the court below, and the plaintiff has appealed. The declaration averred that the plaintiff was in the employment of one Chard, and stood high in his regard and esteem, and that the defendant had so great an influence over Chard that he was afraid to offend him, and that the defendant maliciously intending to alienate the regard and esteem of the said Chard from the plaintiff, and maliciously intending to effect his discharge by Chard from his employment, maliciously wrote and caused to be delivered to Chard a letter in the following words: "John (meaning the plaintiff) has said something *hear* of late which I (meaning the defendant) do not like, and myself (meaning the defendant) nor Lethia (meaning defendant's wife) shall never *poot* our foot on the place (meaning the property of said Chard) as long as (meaning the plaintiff) stays *their*. For they are *to* bad to mention."

The declaration further avers that by reason of the letter, and without any other reason whatever, Chard discharged the plaintiff from his employment, and the plaintiff lost his regard and esteem.

The letter, mentioned in the declaration, stated to Chard the defendant's displeasure at something which the plaintiff was alleged to have said. It was described as something too bad to mention. The declaration does not aver that the defendant falsely charged the plaintiff with using the bad language attributed to him. The law does not assume that the charge was false in the absence of an averment to that effect. It must pass judgment on the pleading according to the facts which it sets forth. A true statement in regard to plaintiff's language certainly would not subject the defendant to a liability to damages. The plaintiff would have no legal cause of complaint if he were truly reported as having used very offensive language. Nor can the defendant be regarded as culpable, because he expressed his indigna-

tion to be so great that he would have no intercourse with him, not even to the extent of visiting the place where the plaintiff was staying. A man certainly has a right to be indignant when foul language is used respecting him, and to make known to his friends and acquaintances and the public generally that his resentment is so great that he will not go to any place where he would be apt to meet the person who had offered him. This seems to be the overt act which has caused the damage of which the plaintiff complains. If the defendant's letter had charged the plaintiff with conduct which would justly incur scorn and contempt, and would render him unfit for social intercourse; if it had even charged him with the commission of an atrocious felony, he could, nevertheless, maintain no action against the defendant if the charge should be proved true at the trial. It is well known that the truth of the offensive words, written or spoken, is a complete justification for the use of them. The rules of practice require the justification to be specially pleaded. This is the technical form of presenting the defence on the face of the record; but this mode of proceeding is the result of another technical rule, and in no way detracts from the force and effect of the truth as an element in the case, which is destructive of the plaintiff's right of action.

We have implied, in what has been said, that the declaration did not show a cause of action, inasmuch as it did not aver that the words of the defendant's letter were false. An examination of the approved precedents will show that in them the words which are the subject of complaint are usually charged as "false, scandalous and defamatory." * * * According to the technical rule which we have mentioned, when the defamatory words are charged in the declaration to be false, the falsity is admitted, unless there is a plea specially alleging that they are true. But if the words are determined to be true, it is of no avail to allege that they were malicious, or that they caused damage to the plaintiff.

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The demurrer was properly sustained, and the judgment will be affirmed.

*Judgment affirmed.*⁵

5. *Falsity, not malice, the gist of the action.* LORD HERSCHELL, in *Allen v. Flood* (1898) 1 A. C. 125, 126: "Some of the learned judges cite actions of libel and slander as instances in which the legal liability depends on the

presence or absence of malice. I think this a mistake. The man who defames another by false allegations is liable to an action, however good his motive, and however honestly he believed in the statement he made. It is true that in a limited class of cases the law, under certain circumstances, regards the occasion as privileged, and exonerates the person who has made false defamatory statements from liability if he has made them in good faith. But if there be not that duty or interest which in law creates the privilege, then, though the person making the statement may have acted from the best of motives, and felt it his duty to make them, he is none the less liable. The gist of the action is that the statement was false and defamatory. Because in a strictly limited class of cases the law allows the defense that the statements were made in good faith, it seems to me, with all deference, illogical to affirm that malice constitutes one of the elements of the torts known to the law as libel and slander.'

GRIFFIN v. GILBERT.

Supreme Court of Errors of Connecticut. 1859.

28 Connecticut, 493.

STORRS, C. J.: The only question made by the plaintiff in error, is, whether the declaration on which judgment was rendered in this case is defective, for the reason that the last count in it is in case, and for a different cause of action from that which is set forth in the other two counts with which it is united, and which are confessedly in trespass.

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We are clearly of the opinion that the third count, properly considered, is in trespass and not in case, and that therefore its joinder with the others is allowable at common law. As a count in trespass it is obviously very informal, and omits several technical expressions which are usually introduced in such a count; such as that the acts were done with force and arms, and against the peace, and that the defendant broke and entered the plaintiff's close or land. But as to the two first of these phrases, it is well settled that, if they ought to be inserted, their omission is a mere formal defect, of which advantage can be taken only by special demurrer; and as to the other, we are aware of no rule or decision which requires the injury to be described exclusively by those very terms, and are of opinion that any other language which imports a forcible and unlawful entry upon the land is substantially sufficient. That the language used in this count plainly describes such an entry, we have

no doubt. It states that the plaintiff was in the lawful possession of the land on which the acts complained of were done; that those acts were the wrongful and wanton plowing and digging of a large and deep ditch on the land, and digging and drawing a large rock from the highway and placing the same and a large quantity of stones upon the land, and that those acts were done wrongfully and wantonly and without law or right. We cannot doubt that a declaration thus setting forth, not by way of inducement, but directly and as a matter of complaint, acts of such a character, should be deemed to describe a cause of action for those acts, rather than for their consequences merely, and so to be a declaration in trespass rather than in case; and that a statement of those consequences should be viewed, not as a description of the cause of action upon which the plaintiff intends to rely as the principal ground of recovery, but as a statement of the result of the acts constituting such cause of action, and introduced only for the purpose of laying the foundation for a recovery of damages for those results, for which otherwise the pleader might suppose no recovery could be had in the action.

There is therefore nothing erroneous in the judgment complained of.

Judgment affirmed.

DUGGAN v. WRIGHT.

Supreme Judicial Court of Massachusetts. 1892.

157 Massachusetts, 228.

TORT. The declaration was as follows: "And the plaintiff says that the defendant has converted to his own use one meat cart, one spring wagon, one meat box sleigh, the property of the plaintiff." * * *

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BARKER, J. * * * The allegation that the defendant has converted the plaintiff's property to his own use is not an allegation of a conclusion of law, but of a fact which may be described as composite, and it allows evidence to be introduced of all such unjustified dealing with the property

named as may tend to show a wrongful taking and disposal of it to the prejudice of the plaintiff's rights. *Wells v. Connable*, 138 Mass. 513. The allegation that the property converted was the property of the plaintiff is not an averment that the plaintiff was absolute owner, but makes admissible any evidence showing that the plaintiff stood in such a relation to the property that she has a right to maintain the action. * * *

JACKSON v. CASTLE.

Supreme Judicial Court of Maine. 1888.

80 Maine, 119.

HASKELL, J.: Does the plaintiff's declaration set out a cause of action? It charges in substance that the plaintiff, being lawfully in a public street with his two-horse team, suffered special damage in the loss of a horse by reason of both horses taking fright at the defendant's sliding in the same street with others engaged in boisterous outcries incident to their sport.

Sliding in a street accompanied with boisterous conduct is not necessarily unlawful. Nor is it necessarily a public nuisance. The averment that defendant's acts were "contrary to law" does not help the plaintiff's case. It is merely a conclusion that he draws from the facts stated. If the facts do not warrant it, the court cannot adopt it.

Sliding in a street, accompanied with boisterous conduct calculated to frighten horses lawfully travelling therein, may be a public nuisance; but there is no such averment in the declaration. Sliding may be prohibited in streets by a city ordinance, and a violation of the same would be evidence tending to show negligence. If the plaintiff would recover, he must show negligent or unlawful conduct to be the proximate cause of his injury.

Plaintiff nonsuit.

THE LAFLIN AND RAND POWDER COMPANY v. TEARNEY.

Supreme Court of Illinois. 1890.

131 Illinois, 322.

MAGRUDER, J., delivered the opinion of the court:

This is an action on the case brought in the superior court of Cook county by the appellee against the appellant company to recover damages to the dwelling, barn and other outhouses upon the premises of appellee, resulting from the explosion of a powder magazine upon the premises of appellant. * * *

* * * * *

It is claimed by the appellant that the declaration does not set out a cause of action. The first objection made to the declaration is that it does not charge the defendant with negligence. The objection is not well taken.

The powder magazine kept by the defendant upon its premises was so situated with reference to the dwelling house of the plaintiff, that it was liable to inflict serious injury upon her person or her property in case of an explosion. It was a private nuisance, and, therefore, the defendant was liable whether the powder was carefully kept or not. As a general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance. If actual injury result from the keeping of gunpowder, the person keeping it will be liable therefor, even though the explosion is not chargeable to his personal negligence. (Woods's Law of Nuisance (1st Ed.), §§ 73, 115, 130, 142; *Heeg v. Licht*, 80 N. Y. 579; *Cheatham v. Shearon*, 1 Swan (Tenn.), 213; *Stout v. McAdam*, 2 Scam. 67; *Ottawa Gas Co. v. Thompson*, 39 Ill. 600; *Nevins v. City of Peoria*, 41 id. 502; *Cooper v. Randall*, 53 id. 24; *Myers v. Malcorn*, 6 Hill. 292; *Hay v. Cahoes Co.*, 2 N. Y. 159; *Phinney v. Augusta*, 47 Ga. 263; *Burton v. McClellan*, 2 Scam. 434; *Weir's Appeal*, 74 Penn St. 230.)

The second objection to the declaration is that it does not specifically aver the powder magazine to be a nuisance. It was not necessary to use the word, "nuisance," if the

facts alleged constituted a nuisance. The declaration avers, that it was the duty of the defendant to so use its premises as not to jeopardize the buildings of the plaintiff, and not to store upon its premises any dangerous substance whereby plaintiff's property might be destroyed in case of an explosion; that the defendant did keep upon its premises a magazine of gunpowder, dynamite, etc., and stored therein a large amount of gunpowder, dynamite, etc.; that the gunpowder, dynamite, etc., so kept upon said premises exploded, and that, by means of such explosion, "the material of which such magazine was constructed was then and there driven with great force and violence upon and against the property of the plaintiff hereinbefore described," and that "the following property of the plaintiff was by means of such explosion struck by flying missiles, rocks and stones, and was wrecked and torn by means of the concussion of the air, then and there caused by said explosion, and was totally destroyed and lost, and was of great value, to-wit: One two-story frame dwelling," etc. "A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. (3 Bl. Com. 216.) Any unwarrantable, unreasonable or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use." (*Heeg v. Licht, supra.*)

The averments of the declaration bring the present case within the definition thus quoted. The fact that the magazine exploded shows that it was dangerous. The fact that the explosion destroyed the plaintiff's buildings, shows, that the keeping of gunpowder in the magazine, considered with reference to "the locality, the quantity and the surrounding circumstances," constituted a nuisance *per se* (*Heeg v. Licht, supra*; Wood's Law of Nuisance, § 142, *supra*).

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TOLEDO, WABASH AND WESTERN RAILWAY
COMPANY v. FOSS.*Supreme Court of Illinois. 1878.**88 Illinois, 551.*

CRAIG, J., delivered the opinion of the court.

This was an action, brought by appellee, to recover for a personal injury received while a passenger on appellant's road, between Jacksonville and Springfield, on the 20th day of March, 1874. The declaration contains two counts. In the first one it is averred that defendant negligently and carelessly ran the train of cars, on which plaintiff was a passenger, violently against and upon a horse, by means whereof the car of the train occupied by plaintiff was thrown from the track, by means whereof plaintiff was injured, etc. The second count is like the first one, except it is averred the defendant willfully ran the train upon the horse. Under this declaration, the plaintiff could not recover on account of any negligence of the railroad company other than that alleged. The allegation and proof must correspond. The plaintiff could not aver negligence in one particular, and, on the trial, prove that defendant was negligent in another regard. One object of a declaration is, to state the facts relied upon for a recovery so plainly that the defendant may be prepared to meet them. This object in pleading would be entirely defeated if a plaintiff had the right to aver in his declaration one ground of action, and, on the trial, prove another and different one.

On the trial of the cause, the court permitted the plaintiff to prove the railroad track was not properly fenced; that a gate was down, so that animals could go upon the road, and, also, permitted the plaintiff to show the train was not provided with steam brakes. This testimony was improper. If the plaintiff based his right of action upon the negligence of the defendant in failing to use proper machinery in the equipment of its trains, or in neglecting to make or keep in repair fences sufficient to keep animals off its track, the established rules of pleading required him to aver these facts in his declaration, so that the defendant might, on the trial, be prepared to meet them by proof. *Illinois Central Railroad Co. v. McKee*, 43 Ill. 120.

This error in the admission of improper evidence was followed by an erroneous instruction upon the same point, which was as follows:

"The court further instructs the jury, for the plaintiff, that every man who has a sound physical system and healthy body, and the free use of his limbs, has the right to retain them, and their use and enjoyment, in any proper, lawful and useful manner; and a railroad company, when transporting such person for hire, has no right to deprive such person of his health, or the free use of any limb, under any circumstances, when, by the use of proper appliances, whether it be air brakes or other improved means of managing a train to avoid accident, or whether it be by the employment of one skillful and trusty brakeman to every two cars in a passenger train, or by other means reasonable and proper, such injury would be prevented; and if the jury believe that said defendant was guilty of negligence in any of the particulars above mentioned, in the operation of its said train on which plaintiff was, and that, by reason of such negligence, the plaintiff was deprived of the free use of one of his shoulders, then the jury should find their verdict for the plaintiff."

It will be observed that the only negligence averred in the declaration is, that the defendant carelessly ran its train upon which plaintiff was a passenger. Under this averment, the jury had no right to consider any negligence of the defendant in its failure to use air brakes or other proper machinery which might have added to the safety or security of the passenger; yet the jury were told by the instruction, if the injury arose from such negligence, the plaintiff was entitled to recover. If authority is necessary to condemn the instruction, we will content ourselves by referring to two decisions of this court, which fully settle the question: *Central Military Tract Railroad Co. v. Rockafellow*, 17 Ill. 541; *Chicago, Burlington & Quincy Railroad Co. v. Magee*, 60 id. 529.

* * * * *

For the errors indicated, the judgment will be reversed and the cause remanded.⁶

6. The doctrine of *res ipsa loquitur* is a rule of evidence and not a rule of pleading, and it does not in any way exempt the plaintiff from the necessity of alleging negligence. See note to *Cleveland, C., C. & St. L. Ry. Co. v. Hadley* (1908) 16 L. R. A. (N. S.) 527.

STRAIN v. STRAIN.

*Supreme Court of Illinois. 1853.**14 Illinois, 368.*

CATON, J.: The demurrer to this declaration was properly sustained. It fails to show the proper connection between the defendant's act, or his negligence, and the injury to the plaintiff's mare. The most that it charges is, that the defendant wrongfully put his horse into the plaintiff's stable, where his mare was confined; "and so carelessly and negligently behaved and conducted himself, that the said mare of the plaintiff then and there was greatly torn, kicked," etc. What kicked the mare is not shown; whether the defendant, or his horse, or something else, is left to conjecture. The gist of the complaint is, that the defendant so carelessly conducted himself that the plaintiff's mare was injured, but how or in what way his carelessness contributed to the injury, is not shown. Under this declaration one act of carelessness might be proved as well as another. It fails to show what specific act the plaintiff might be called on to meet. For aught that appears in this declaration, there may have been no connection whatever between the act of putting the horse in the stable and the injury to the mare. Something altogether foreign from that act may have produced the injury. The declaration should have shown in what way the careless or negligent conduct of the defendant contributed to, or produced the injury complained of. The same omission to show in what way the careless acts of the defendant produced the injury is observable in each of the counts of the declaration.

The judgment of the circuit court must be affirmed.

Judgment affirmed.

DI MARCHO v. BUILDERS' IRON FOUNDRY.

*Supreme Court of Rhode Island. 1893.**18 Rhode Island, 514.*

Trespass on the case for negligence causing personal injury to the plaintiff. On demurrer to the declaration.

* * * * *

June 12, 1893. *PER CURIAM*. We think that the amended declaration is defective. The allegation against the defendant is that the corporation threw or caused to be thrown a box, etc. Since a corporation can act only through a servant the allegation is in effect that the box was thrown or caused to be thrown by a servant of the corporation. The plaintiff alleges that he was a servant of the corporation engaged in his employment at the time of receiving the injuries of which he complains. It follows, therefore, that the act which occasioned the injuries was the act of a fellow-servant, for which the corporation *prima facie* at least was not liable.

We think it is necessary in order to state a case, that the declaration should set forth the relation to the corporation of the person who threw the box or caused it to be thrown, so that it may appear that he was not a fellow-servant with the plaintiff within the rule exempting the master from liability for injury resulting from the act of a fellow-servant, or if a fellow-servant that the defendant was negligent in employing him or retaining him in its service.

Demurrer to amended declaration sustained.

McGANAHAN v. THE EAST ST. LOUIS AND CARON-
DELET RAILWAY COMPANY.

Supreme Court of Illinois. 1874.

72 Illinois, 557.

CRAIG, J., delivered the opinion of the court.

This was an action on the case, brought to recover damages for an injury received by the plaintiff in coupling cars of the defendant. A demurrer was filed to the declaration, which was sustained. The plaintiff brings the record here by appeal, and assigns for error the decision of the court in sustaining the demurrer.

The declaration contains but one count, in which it is averred that, on the 17th of March, 1873, the defendant employed the plaintiff as a brakeman, and that it was his duty to couple together the cars of defendant; that while

he was so engaged, he received only ordinary wages, and did not assume any special risks, but only such as were ordinarily incident to such employment; that it was the duty of the defendant to furnish suitable cars and appliances, so as to enable him to perform his duty with safety; that defendant did not furnish safe and suitable cars, but negligently furnished a car for the transportation of certain railroad iron, which was unsafe; that the car was much shorter than the iron, so that the iron projected over the ends of the car, thereby rendering it unsafe and dangerous to plaintiff while in the performance of his duty, all of which the defendant well knew; that while the plaintiff was coupling two of defendant's cars, one of which was a box car, on its track, and the other was a rear car of a train attached to an engine of defendant, which engine and train were being backed up by defendant to be coupled to the box car, he necessarily had to go between the cars to couple them; that while his attention was wholly absorbed in watching the signals from the train, which was backing up, and while he was between the cars for the purpose of making the coupling, the cars came violently together, and while he was using all due care, and without fault or negligence on his part, without any knowledge or notice whatever that the iron bars were projecting over the end of the car at the time, etc., but by reason of the negligence of the defendant, he had his right hand caught between said cars, and thereby mangled and hurt, etc.

The declaration cannot be held sufficient. The only act of negligence on the part of the defendant, of which the plaintiff seems, by his declaration, to complain, is, the car upon which the iron was loaded was too short, and the iron projected over the end of the car.

While this may be conceded to be an act of negligence on the part of the defendant, yet, unless this negligence of the defendant contributed, in some degree, to the injury received by plaintiff, then it certainly could be no ground of recovery.

The declaration does not aver that the plaintiff was injured by the iron projecting over the end of the car. The substance of the averment is, that the cars came violently together, and his hand was caught between the cars and injured while he was in the act of coupling the cars. For aught that we are able to perceive, this would as readily

occur if no iron had been projecting over the end of the car.

The plaintiff entirely fails, by his declaration, to show that the injury received was occasioned by the negligence he attributes to the defendant. This objection to the declaration we regard as fatal.

The judgment of the circuit court will, therefore, be *affirmed*.

EIBEL v. VON FELL.

Supreme Court of New Jersey. 1899.

63 New Jersey Law, 3.

MAGIE, C. J.: The demurrer is interposed to a declaration which contains two counts.

If either count is free from objection the demurrer must be overruled. *Perdicaris v. Trenton, etc., Co.*, 5 Dutcher, 367; *Beavers v. Trimmer*, 1 id. 97; *Belton v. Gibbon*, 7 Halst. 76.

My examination of the first count of the declaration has led me to the conclusion that it exhibits a good cause of action, not, as claimed in plaintiff's brief, for a false warranty, but for deceit.

It is settled in this court that to support an action for deceit there must appear a false representation made with a fraudulent intent, producing injury to the plaintiff. If it appear that the falsity of the representation was known to defendant the fraudulent intent is deemed to be conclusively established. If, however, the representation made by defendant, though false, was not known by him to be false, the action can only be supported by proof that it was made *malo animo* and with intent to deceive. *Cowley v. Smyth*, 17 Vroom, 380.

It follows that a good cause of action for deceit may be set out without a charge that the representation alleged to be false was known by defendant to be so, provided it is charged that the false representation was fraudulently made. As was said in the leading case of *Pasley v. Freeman*, 3 T. R. 51, in respect to pleading in this action, "fraud-

ulenter without sciens or sciens without fraudulenter" will be sufficient.

Tested by these rules, the first count of the declaration manifestly discloses a good cause of action. It charges that the plaintiffs, at the request of the defendants, bargained for the purchase from defendants of a lot with a house upon it for a certain price, and that the defendants, by falsely and fraudulently representing that the house was new, sold the premises to plaintiffs for the proposed price, which was paid. Then follows an allegation that the house was in fact old and its timbers rotten, whereby the plaintiffs were injured. Proof that the representation charged was made; that it was false in fact; that defendants, although ignorant of its falsity, had made it with intent to deceive and that the deception had injured plaintiffs, would justify a recovery. The liability of defendants in such case is sufficiently and properly characterized in the pleading as arising upon a representation which was false and also fraudulent.

For this reason the demurrer must be overruled.

(1) Damages.

BECK AND GREGG HARDWARE COMPANY v. KNIGHT.

Supreme Court of Georgia. 1904.

121 Georgia, 287.

LAMAR, J.: This was an action on a sheriff's bond. The breach alleged is his failure to levy and return an attachment. No special damages are set forth; and the question raised is whether there is a presumption that the plaintiff has been injured to an amount equal to the debt named in the writ of attachment, or, if not, whether it may maintain a suit for the recovery of nominal damages. At the outset it must be conceded that the authorities in England, the United States, and Georgia are in much conflict. See 2 Sutherland on Damages (3d Ed.), §§ 489-492; *Crawford v. Word*, 7 Ga. 445; *Hunter v. Phillips*, 56 Ga. 636; *Hackett*

v. Green, 32 Ga. 512. * * * However, in spite of the conflict and the want of a direct authority, all of the later cases now point one way.

1. A sheriff is bound to serve original process, and to execute and return mesne and final process. Both he and his sureties are liable to any person aggrieved by his misconduct in regard thereto. *Colquitt v. Ivey*, 62 Ga. 168. But these writs differ in kind and in effect. The pleadings, burden of proof, and presumptions likewise, vary according as the suit is for a breach of duty as to one or the other. Where the plaintiff has established the validity of his debt, recovered a judgment, obtained a lien, and places the *fi. fa.* in the hands of the officer for levy and return, and the sheriff fails to comply with the mandate of the writ, there is not only a breach of duty, but the presumption arises that the plaintiff has been damaged the amount of the debt. *Wheeler v. Thomas*, 57 Ga. 162 (2). The burden is then upon the sheriff. *Reeves v. Parish*, 80 Ga. 222; *Mullins v. Bothwell*, 29 Ga. 706; *Smith v. Banks*, 60 Ga. 642; *French v. Kemp*, 64 Ga. 750. Under the later cases, he may shift the burden and rebut the presumption, by proof of facts mitigating the plaintiff's damages, or by showing that the money could not have been collected on the *fi. fa.* by the exercise of reasonable diligence.

2. But where, as here, the process is mesne, the rule is different. The plaintiff has not even established the amount of its debt. It does not follow that it will ever recover a judgment, or that the property pointed out as subject to the attachment would ever be subjected to the payment of the debt. No presumption can arise in favor of the plaintiff, and none against the officer. In order, therefore, to set out a cause of action, or to recover at the trial, the plaintiff must aver enough to show that he has been actually injured. The *ad damnum* clause is not a sufficient allegation of damages. *Watters v. Retail Clerks Union*, 120 Ga. 424. The failure to show, why, and to what extent the plaintiff has been injured renders the petition demurrable. *Riggs v. Thatcher*, 1 Me. 69; *State v. Fleming*, 24 N. E. 65; *Bank of Hartford v. Waterman*, 26 Conn. 325, 333; and especially *Brown v. Fry*, 4 W. Va. 721, and *Shanklin v. Francis*, 59 Mo. App. 179, where the suit was for failure to levy and return a writ of attachment. "The sheriff is liable to an action on the case, or an attachment for con-

tempt of court, wherever it shall appear that he hath injured such party, either by false return or by neglecting to levy on his property." To make the sheriff liable for the breach of duty it is necessary that it should be made to appear to the court that the plaintiff has been injured. *Hackett v. Green*, 32 Ga. 512; *Currell v. Phillips*, 18 Ga. 469; *Hunter v. Phillips*, 56 Ga. 634. While these were rulings as to final process, the principle would be even more strongly applicable to suits for failure to execute mesne process. In *Colquitt v. Ivèy, supra*, the case was against the sheriff for failing to serve original process, causing the action to be dismissed. It was alleged that the defendant who should have been served had afterwards removed from the State, that he was solvent, and that the plaintiff lost a debt he would otherwise have collected. It was held that the petition as amended set out a cause of action. So in *Snell v. Mayo*, 62 Ga. 743, the sheriff failed to arrest the body of the defendant, or to take bond, or to seize the goods. The plaintiff recovered a verdict in the bail-trover action, execution issued for the value of the goods, and there was a return of *nulla bona*. The sheriff was held liable for the damage. The necessity for the proof of actual damages, where the officer is sued for failing to return other than final process, was recognized in the early case of *Crawford v. Anderson*, 6 Ga. 247, the court saying, "We hold the law to be incontrovertibly settled, that for an escape on mesne process no action lies unless some damage has been sustained, and that the plaintiff is only entitled to recover such damages as he can show he has sustained." If he must show it in his proof, he must aver it in his pleadings. The authorities are in great conflict on this subject, but the rulings in this State would indicate that as the gist of such action is the injury done, the plaintiff cannot maintain a suit for the recovery of nominal damages. There is no contract between the citizen and the officer, and therefore the private individual cannot sue for a mere breach of duty. There must be injury. Pol. Code, § 12. "A neglect to serve mesne process is not in itself a legal injury * * * and the officer is not liable in nominal damages for neglect to serve mesne process." *Brown v. Jarvis*, 1 M. & W. 708; *Bank of Hartford v. Waterman, supra*. Where there is an injury to a right, even independent of actual loss, the want of injury merely makes the damages nominal. But

where the whole gist of the case is the pecuniary damage, some such damage must be proved, or the action will fail. 2 Suth. Dam. (3d Ed.) 1349.

Of course the court, for its own protection and that of the public, may proceed against the officer by attachment for contempt, fine or other appropriate proceedings. But with that a plaintiff has nothing to do. He does not stand either as the direct or indirect guardian of the public, nor is it for him as an individual to enforce the performance of the statutory duty. On petition for rule or mandamus a citizen may compel the performance of any duty in which he has an interest. But when he sues the sheriff for money, he must show that he has suffered a money loss. He cannot speculate on the officer's neglect or misconduct, so as thereby to convert what might have been an ineffective suit against his original debtor into an effective suit for damages against the sheriff. He cannot substitute one cause of action for the other. It no doubt often happens that there are technical or even substantial breaches of duty by officers of court. They may fail to file or docket the petition at the time and in the manner required by the statute. They may fail to issue process or subpoena. They may neglect to execute and return writs as directed in the code. If the mere breach of duty gave rise to a cause of action regardless of whether it was followed by injurious consequences or not, every such plaintiff might for every such breach maintain an action and recover nominal damages and cost, even though the witness may have voluntarily attended, or the defendant may have appeared and pleaded, or the execution though delayed may have been levied and the money collected. Such is not the law. The gist of the action not being the breach but the injury, a petition failing to charge such injury sets out no cause of action. But here, in the face of special and general demurrers pointing out the defects, the plaintiffs failed to aver that they had or would have obtained judgment and subjected the property pointed out to levy. They also failed to aver that the defendants in attachment, were insolvent and nonresident, or that by reason of the officer's breach they would be unable to collect their debt, or that they had been injured by the delay, or put to any expense. The matters in aggravation might have authorized a rule, and they might also have increased the damages if a cause of action had been stated

and proved; but they could not aid an otherwise defective declaration. The petition must be construed most strongly, against the pleader. The failure to allege that they had been or would be actually damaged rendered it demurrable.

We do not mean to hold that in every case the original claim must be sued to judgment and a return of *nulla bona* be made. The law will not compel the plaintiff to do an impossible or useless thing. Proper allegations and proof may supply the need for such allegations. *W. U. Tel. Co. v. Bailey*, 115 Ga. 725 (3); *Colquit v. Ivey*, 62 Ga. 169; *Collins v. McDaniel*, 66 Ga. 203; *Swan v. Bridgeport*, 70 Conn. 143.

*Judgment affirmed.*⁷

7. In those actions where a right is deemed to have been invaded without regard to the question whether any actual damage was done, no allegation of damages would seem to be necessary in order to state a cause of action. Such would be the case in slander and libel upon words actionable *per se* (*Pratt v. Pioneer Press Co.* (1886) 35 Minn. 251), and in trespass to person or property (*Bragg v. Laraway* (1893) 65 Vt. 673; *Tuberville v. Savage* (1681) 1 Mod. 3; *Webb v. Portland Mfg. Co.* (1838) 3 Sumner (U. S. C. C.) 189).

On the other hand, damage is of the gist of many torts, and in such cases an allegation of damages would seem to be necessary to disclose the existence of a cause of action. This is true of *deceit* (*Jackson & Sharp Co. v. Fay* (1902) 20 App. Cas. D. C. 105), *nuisance* (*Campbell v. Seaman* (1876) 63 N. Y. 568), particularly in cases of public nuisance (*Sullivan v. Waterman* (1898) 20 R. I. 372), *libel and slander* based on words not actionable *per se* (*Pollard v. Lyon* (1875) 91 U. S. 225), and *negligence* (*Washington v. Baltimore, etc. R. Co.* (1880) 17 W. Va. 190).

See, also, *Howell v. Young* (1826) 5 Barn. & Cres. 259, given *supra* in the text.

PEGRAM v. STORTZ.

Supreme Court of Appeals of West Virginia. 1888.

31 West Virginia, 220.

GREEN, J.: This action was brought by the plaintiff, Nancy A. Pegram, against John G. Stortz, a saloon keeper, for selling intoxicating liquor to her husband after he had been served by her with a written notice not to do so, whereby he became intoxicated, and by reason thereof injured her in her means of support. The action is given by a statute passed in 1877.

* * * * *

* * * There is another objection to this count in the declaration; but, while it is not a fatal objection, it would have the effect of confining the plaintiff very much in the proof she might be allowed to produce before a jury on a plea of not guilty to such a declaration. These allegations in this second count, excluding the portions which I have shown are surplusage, are, in general terms, that the plaintiff's husband, at divers times prior to a certain time named, became intoxicated, and by reason thereof did injure the plaintiff in her means of support, depriving her of food, clothing, and other necessities and comforts of life. Under a general allegation of this character, only general damages, as they may be called—that is, such damages as necessarily result from his being drunk—such as helplessness and incapacity for labor, can be proven, as this would tend, in some cases, to injure the wife in her means of support, as being the result of his incapacity to labor. But, on general principles of pleading, damages, though the natural consequence of the drunkenness of the husband, if they are not necessarily the result of such drunkenness, but are what is called “special damages”—such as, for instance, the spending of his means while drunk, breaking up or destroying property, and the like—cannot be proven unless especially alleged in the declaration. No acts of this sort can be proven under such a declaration as was filed in this case. If the plaintiff wished to rely on any such grounds, she should have specified them particularly, so as to give the defendant notice, and prevent a surprise. What are the necessary results of drunkenness, such as helplessness, and inability to labor, the defendant is presumed to know, and they need not be specified in the declaration; but he is not presumed to know what are not the necessary consequences of drunkenness, though they may be the natural consequences. These differ very widely. Some are made very close and miserly by becoming drunk; others very prodigal. Some are made quarrelsome and destructive of all property around them; others unusually good-natured. So it is obvious that, if damages are claimed for acts which are not the necessary results of the husband's drunkenness, but only the natural results, they must be specified in the declaration, as well as that the plaintiff was thereby injured in her means of support; and how she was injured by the specified acts must be stated in the declaration. For the

general principles of pleading which lead to these conclusions, see 1 Chit. Pl. (4th Ed.) 328, 346, 347; 2 Greenl. Ev. § 254, p. 246; *Baker v. Green*, 2 Bing. 317; *Pindar v. Wadsworth*, 2 East, 154; *Armstrong v. Percy*, 5 Wend. 538, 539; *Dickinson v. Boyle*, 17 Pick. 78. And for application of these general principles to cases like the one before us, see *Hackett v. Smelsley*, 77 Ill. 109; *Barnaby v. Wood*, 50 Ind. 405. But, though in particular cases it may be very desirable for the declaration to specify the particular acts, whereby the wife was injured in her means of support, yet the failure to do so will not vitiate the declaration, and a general declaration that in consequence of the drunkenness she was injured in her means of support [is good against a demurrer], though under such a declaration she will be much restricted in the proofs she may wish to bring before the jury. For these reasons, the demurrer to the second count in the declaration was properly overruled.

HEISER v. LOOMIS.

Supreme Court of Michigan. 1881.

47 Michigan, 16.

COOLEY, J.: Loomis sued Heiser in trespass for assault and battery. The evidence tended to show that, on the third day of August, 1877, Heiser with some other persons suddenly came upon the plaintiff, and with words such as, "I have got you where I want you now," "We'll give you what you deserve," proceeded to strike and kick him until he was seriously injured. * * *

* * * * *

The most important question in the case is whether the court correctly admitted certain evidence of special damages. The declaration averred that the plaintiff, because of the wounds, bruises and injuries inflicted upon him by the defendant "was greatly hindered and prevented from doing and performing his work and business and looking after and attending his necessary affairs and avocations for a long space of time," etc. The plaintiff testified that his business was that of a farmer; and under objection he

was permitted to state that his farm was a grass farm; that when assaulted he was about half through cutting his hay; that he was bothered some about help, and that the cutting was delayed because of his injury, and that his crop of hay was damaged in consequence at least fifty dollars. The defendant contends that this evidence of injury to his hay was inadmissible, because the declaration contained no special averments which would fairly apprise the defendant of the purpose to offer it.

We have been very liberal in this State in receiving evidence of special injuries when the declaration averred them; much more so than the courts of some other States. The cases of *Chandler v. Allison*, 10 Mich. 460; *Allison v. Chandler*, 11 Mich. 542; *Gilbert v. Kennedy*, 22 Mich. 117; and *Welch v. Ware*, 32 Mich. 77, will sufficiently attest the fact. The difference in the rules applicable in cases of contract and tort has also been carefully marked and emphasized. Where only a breach of contract is involved, the defendant is not to be made liable for damages beyond what may fairly be presumed to have been contemplated by the parties at the time the contract was entered into. The damage allowed in such cases must be something which could have been foreseen and reasonably expected, and to which the defendant can be deemed to have assented, expressly or impliedly, by entering into the contract. *BOVILL*, Ch. J., in *British, etc., Co. v. Nettleship*, L. R. 3 C. P. 499; *Hadley v. Baxendale*, 9 Exch. 344; *Hopkins v. Sanford*, 38 Mich. 611. But in cases of tort the plaintiff does not assist in making the case; it is made for him against his will by a party who chooses his own time, place, and manner of committing the wrong, and if the nature of the case which he thus makes up is such that the elements of injury are uncertain and there is difficulty in arriving at the just measure of redress, the consequences should fall upon the wrongdoer. "To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation." *Gilbert v. Kennedy*, 22 Mich. 117, 130.

But where the damages are such as do not follow the injury, as a necessary consequence, they should be specially alleged in the declaration. This is a rule of fairness, that

the defendant may know what case it is intended to make against him, and be prepared to meet it, if it is false or falsely colored. In the cases above cited from our own reports, the allegations of special damage were very full and specific. But in this case there is only a general allegation that the plaintiff was prevented from doing and performing his necessary business and looking after and attending his necessary affairs and avocations. This inability may well be said to flow as a necessary consequence from any severe injury; and it was therefore held in *Tomlinson v. Derby*, 43 Conn. 562, that such an averment could only be construed as characterizing the injury and indicating its extent in a general way, and that it did not lay the foundation for proof of special damages in a particular employment. Evidence that plaintiff was engaged in a particular business, at which he was earning one hundred dollars a month, was therefore excluded in that case, though the declaration was similar to the one here. *Taylor v. Monroe*, 43 Conn. 36, is to the same effect. *Wade v. Leroy*, 20 How. 34, must be regarded as opposed to these. In *Baldwin v. Western R. R. Corp.*, 4 Gray, 333, similar evidence was held inadmissible; under the general allegation of injury. The action was for a physical injury, and the plaintiff had been permitted to show that she was by occupation a school teacher and possessed the necessary education and learning. The court said the evidence "could have had no relevancy or application to the questions at issue between the parties, except as forming the basis on which special damages were to be assessed for the injury of which she complained. It did not tend to show an injury falling within the class of general damages. That class includes only such damages as any other person, as well as the plaintiff might, under the same circumstances, have sustained, from the acts set out in the declaration. Without determining the more difficult question whether the evidence would be admissible under any form of declaration, it is clear that this part of the plaintiff's claim could be founded only upon a peculiar loss sustained by her by reason of the interruption to her occupation resulting from the tortious act of the defendants. They were therefore in their nature damages not necessarily flowing from the acts set out in the declaration, and of which the defendants could not be supposed to have notice unless they were properly averred." Evidence

of this nature was received in *Hanover R. R. Co. v. Coyle*, 55 Penn. St. 396, but the report does not give the pleadings. See also *N. J. Express Co. v. Nichols*, 33 N. J. 434.

The general spirit of our decisions would perhaps lead to a more liberal rule than that applied in Connecticut as above shown, but would not, I think, support the ruling complained of here. What was the special injury complained of in the declaration? Only that the plaintiff, by reason of the battery, was greatly hindered and prevented from doing and performing his work and business, and looking after and attending his necessary affairs and avocations. Did this fairly apprise the defendant that the plaintiff would seek to show, not merely that he was disabled from pursuing a particular employment not mentioned, but also that, by reason of the inability to obtain laborers, his property went to ruin? (If there is a natural and inseparable connection between the alleged injury and the damage, then the defendant should have been prepared to meet such showing; otherwise he was entitled to more specific allegations. But there is no such natural and inseparable connection; the circumstances must be altogether exceptional which would cause a farmer to lose his crops because he could not personally gather them. Indeed, according to the plaintiff's showing, the circumstances were exceptional here; for the injury to the hay is attributed to the difficulty of obtaining help to save it. But the defendant, had he been apprised of the purpose to claim for such a damage, might perhaps have shown that the difficulty was wholly imaginary, or that the plaintiff willfully suffered his hay to be injured when he might have avoided it. It was his right to make such a showing, if the facts would warrant it. (But he could not be aware of the necessity until he was notified that damage to the hay by reason of the battery was claimed.)

The judgment, I think, should be reversed and a new trial ordered.

**THE WEST CHICAGO STREET RAILWAY COMPANY
v. LEVY.**

Supreme Court of Illinois. 1899.

182 Illinois, 525.

CARTER, J., delivered the opinion of the court.

This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court of Cook county, against appellant, for a personal injury. Appellee was driving in a buggy on Robey street when appellant's electric car came up from behind and struck the buggy, threw appellee out and injured him.

Respecting the injury and damages the declaration alleged that the plaintiff "was severely and dangerously cut, bruised, wounded and injured, both internally and externally; that plaintiff's back and spine and brain were thereby then and there severely and dangerously and permanently injured, and divers bones of his body, arms and limbs were then and there and thereby fractured and broken, and plaintiff was otherwise severely, dangerously and permanently injured, both internally and externally;" that on account of said injuries "plaintiff became sick, sore, lame, disordered and injured, and so remained for a long space of time, during which said time he suffered great bodily pain and mental anguish, and still is languishing and intensely suffering in body and in mind, and in future will continue to suffer from the effect of said injuries for the rest of his natural life." And the principal assignment of error relied on is that the court permitted the plaintiff to prove that one of the effects of his injuries was atrophy of the optic nerve and consequent impairment of his eyesight. The contention is, that the evidence showed that this condition of the optic nerve was produced by defective nutrition, and not by any direct injury it received in the accident; that it was not the natural and necessary result of the injury, and could not therefore be proved under the allegation of general damages, and, not having been alleged as special damages, could not be proved at all. We are of the opinion that the evidence was properly admitted under the allegations. It is not necessary to allege specially every injury

to each part of the body, in actions of this character, in order to prove them on the trial. Injury to the back, spine and brain was alleged, and the evidence tended to show that such injury was the natural and proximate cause of the defective nutrition to the optic nerve and impairment of the plaintiff's eyesight. The damages claimed, therefore, were not special, but general, and could be recovered without being declared for specially. See *Lake Shore and Michigan Southern Railway Co. v. Ward*, 135 Ill. 511; *Chicago and Erie Railroad Co. v. Meech*, 163 id. 305; *North Chicago Street Railroad Co. v. Brown*, 178 id. 187; *Tyron v. Booth*, 100 Mass. 258; *Baltimore and Ohio Southwestern Railway Co. v. Slanker*, 180 Ill. 357.

* * * * *

Judgment affirmed.

SCHOFIELD v. FERRERS.

Supreme Court of Pennsylvania. 1869.

46 Pennsylvania State, 438.

STRONG, J.: This was an action of replevin for a horse, to which the defendant pleaded *non cepit*, and property in himself. The declaration averred the taking of a horse of the value of \$150, and an illegal detention. It concluded by claiming damages in the sum of \$1,000. On the trial the court instructed the jury that, in estimating the damages, "they were not confined to the value of the horse, but if they thought the taking of him was accompanied with circumstances of outrage and oppression, they could go beyond the value." A verdict having been returned for \$250 in favor of the plaintiff below, the defendant has sued out this writ of error, and he now complains of the instruction given. It is said that as the declaration contained no count claiming special damage, nor any averment that the taking of the horse was accompanied with circumstances of outrage and oppression, the jury were not at liberty to assess damages beyond the value of the horse. The objection is untenable for two reasons. In the first place, it is made after the evidence of the mode of taking had been received, so far as it appears, without objection. And secondly, the

rules of pleading do not require that the circumstances which attended the taking should be specially averred in order to entitle the plaintiff to recover damages commensurate with them. If consequential damages are claimed, not necessarily or naturally resulting from the tortious act, they must be specially alleged. But if outrage and oppression attended the taking, they belong to the wrongful act itself, and are not merely special injury.

That in replevin, damages beyond the value of the property may be given where the taking has been accompanied with peculiar wrong and outrage, was ruled on abundant authority in *McDonald v. Scaife*, 1 Jones, 381.

*Judgment affirmed.*⁸

8. But distinct acts in aggravation should be alleged. See *Boerum v. Taylor* (1848) 19 Conn. 122, given *infra* in the text.

FOREMAN v. SAWYER.

Supreme Court of Illinois. 1874.

73 Illinois, 484.

CRAIG, J., delivered the opinion of the court.

This was an action of covenant, commenced in the circuit court of Whiteside county, by George E. Sawyer against Benjamin S. Foreman.

The *ad damnum* in the declaration was for only the sum of \$300, while the judgment rendered by the court was \$555.

The law is well settled, that the judgment cannot exceed the *ad damnum* laid in the declaration. *Oakes v. Ward*, 19 Ill. 46; *Brown v. Smith*, 24 Ill. 196.

It was, therefore, error for the court to render judgment for a larger sum than that claimed in the declaration; for which the judgment will be reversed and the cause remanded, with leave to amend the declaration.

*Judgment reversed.*⁹

9. "The rule is well settled, a party may recover less than he claims—he is never confined to the precise amount for which he brings suit."—*Sawyer v. Daniels* (1868) 48 Ill. 270.

In case of discrepancy between the items of damage alleged and the amount named in the *ad damnum* clause, the former will control. Thus in *Abernathy*

v. Township of Van Buren (1884) 52 Mich. 383, the plaintiff alleged that "during all the time she thereby suffered great pain and was hindered from transacting her affairs, to her damage one thousand dollars," and that she was obliged to lay out money amounting to one hundred dollars for board, lodging, care and medical treatment, to her damage ten thousand dollars. It was held that no judgment beyond \$1100 could be recovered.

SECTION 4. FORM OF ALLEGATIONS.

(a) *Pleading According to Legal Effect.*

JOHNSON v. CARTER.

Supreme Judicial Court of Massachusetts. 1820.

16 Massachusetts, 443.

The declaration contained two counts in *trespass*, for breaking and entering two closes of the plaintiff, cutting down trees, etc. * * *

The defendant also pleaded in bar to the first count that, before the supposed trespass, viz., on etc., at etc., one Joseph McIntire, who was then the lawful guardian of the plaintiff, for a valuable consideration then and there received of the defendant, gave him license to enter upon said close, cut and carry away said trees, continue therein, use, occupy, and take the profits of the same; by force whereof the defendant on the same day, lawfully entered into the said close, cut and carried away the said trees, and continued to use, etc., until the commencement of the plaintiff's action, without any legal notice to quit.

The plaintiff replies, that after the day on which the said license is alleged to have been given, and before the trespasses were committed, the said Joseph McIntire died, viz., on, etc., at, etc., whereby the said supposed license was revoked and annulled.

To this replication the defendant demurs generally, and the plaintiff joins in demurrer.

* * * * *

JACKSON, J.: As to the first count, it is very clear that a license by the guardian would determine at his death. This is not denied; but it is said, that the facts stated in the plea show that this was a lease, and not a license; and that,

if it was a lease, the defendant was not a trespasser by holding over after the end of the term, but would be a tenant at sufferance, until a re-entry by the plaintiff, or a notice to quit; and that the defendant ought not to be prejudiced by having miscalled it a license.

If such a mistake had occurred in a deed, or any act in pais, the court would not, perhaps, be precluded from construing the expression according to its legal effect and the true intent of the parties. But more strictness is required in pleadings. The party is to state his case, according to the legal effect and operation of the facts, on which he relies. It is not sufficient to display the evidence on the record, and leave it to the court to infer that there was a feoffment, a lease, or a license; but he must say that the party did enfeoff, or did demise, etc. If the defendant in this case had pleaded a lease by the guardian, the plaintiff might have traversed it; and from what appears in the case, there seems to be no doubt she would have done so; because on the general issue to this same count, she obtained a verdict. It being pleaded as a license, she had no occasion to deny it, although it might be wholly untrue; because she had a better answer, viz., that all the trespasses complained of were committed after the expiration of the supposed license.

* * * * *

There must be judgment for the plaintiff upon both the counts.

BEAN v. AYRES.

Supreme Judicial Court of Maine. 1878.

67 Maine, 482.

Case upon the defendants' accountable receipt for 1945 spruce and hemlock logs attached by the plaintiff, as a deputy sheriff, upon certain writs. * * * The declaration sets out that the plaintiff attached the logs, and at the request of the defendants delivered the logs to them, "and thereupon the said defendants executed under their hands and delivered to the plaintiff an agreement in words and figures as follows, to wit: "Penobscot ss. August 23, 1872."

Then follows the receipt, *ipsisimis verbis*, closing with the signatures. Then follows: "Whereby the said defendants then and there became liable to return said logs to said plaintiff on demand, or on failure so to do, indemnify and save harmless," etc., but not alleging any promise. Then follows an averment of the entry of the writ, the recovery of the judgments, the demand and refusal to return the logs and failure to save harmless, to the damage, etc.

To this new declaration, the defendant demurred specially, assigning for causes:

* * * * *

Third, that the legal purport and effect of said agreement set forth in said new declaration as made by said defendants with said plaintiffs, is not directly alleged in said new declaration, but that the said agreement is therein improperly set forth in words and figures, and that the liability and promise of said defendants thereon, by recital and reference, is in form and manner improperly, circuitously, indirectly, argumentatively and insufficiently alleged and set forth. And also that the said new declaration is in other respects uncertain, informal and insufficient."

The presiding justice after joinder overruled this demurrer and adjudged the new declaration or second count good; and the defendants alleged exceptions.

PETERS, J.: * * *

* * * * *

We find more difficulty upon the more prominent point of objection, that the contract is set out in its entire words and figures and not according to its legal effect. No doubt, it is much the better practice to set out an instrument, not by its form and its terms, but according to its legal operation and effect. But there is no imperative rule against reciting an instrument *in haec verba* in pleadings. A declaration will not be rejected on that account, provided that upon all the averments and recitals taken together a good cause of action is sufficiently stated. It is an objectionable mode of pleading where it involves a needless and unnecessary statement of facts. A demurrer, however, does not reach that difficulty. A demurrer complains of too little and not too much matter in a declaration. The maxim *utile per inutile non vitiatur* applies. The remedy may be to move to strike out or reduce useless and redundant allegations. Upon inspection, the court may order it to be done.

But the point here urged is, that the recital of the contract is not accompanied with averments enough to constitute a legal declaration. The weakness in the declaration is that, although an action of *assumpsit*, no promise is directly and positively asserted therein, but it is stated argumentatively and only inferentially, if at all. The plaintiff declares that the defendants executed under their hands and delivered to him an agreement. He does not say that they made any promises in accordance with such agreement. He does aver that thereby the defendants became liable to perform the agreement described in the declaration. But that is an allegation of law and not of fact. It is the pleader's inference of law from the facts previously stated. Gould Pl. c. 9, § 29; *Millard v. Baldwin*, 3 Gray, 484. Nor does a demurrer admit a mere statement of a conclusion of law from the facts averred. Chitty Pl. 2 Vol., 18th Am. Ed. 694, and notes; *Chapin v. Curtis*, 23 Conn. 388; *Craft v. Thompson*, 51 N. H. 536. The contract itself should have been averred, not merely the written evidence of the contract. The facts are not averred, but the written evidence of the facts only is averred. The writing is a matter of evidence, and not a matter of allegation. It is evidence, but not conclusive evidence, of an undertaking and promise. It may have been obtained by fraud or mistake; in which case it contains no legal promise. The general issue in *assumpsit* is that the defendant never promised. That plea would not strictly raise an issue here, for the plaintiff does not assert that these defendants ever did promise. The plaintiff avers that he has a written evidence of promise, and a general denial would be that he has not.

The authorities are many that support this view. We quote from a few of them.—Chitty says: “The principal rule, as to the mode of stating the facts, is, that they must be set forth with certainty; by which term is signified a clear and distinct statement of the facts which constitute the cause of action or the ground of defense.” All the writers upon the subject of pleading at common law say the same thing. Here a material fact is not affirmatively stated. Chitty. P. Declaration.

In *Watriss v. Pierce*, 36 N. H. 232, it was decided that a replication was bad which traversed no fact alleged in a plea, but which was mostly a statement of facts which would in evidence tend to prove a point had it been properly

pleaded, because it offered no issue by the finding of which the case could properly be determined. BELL, J., says: "The facts essential to a defense must in general be expressly and substantially alleged. The statement of mere evidence tending to prove a material fact is not sufficient. Such a mode of pleading, if admitted, would refer the matter of fact in question to the court instead of the jury. Thus, if in trover the plaintiff allege a demand and refusal, but omits to aver a conversion, the declaration is ill, the demand and refusal being only evidence of a conversion, which is the gist of the action."

In *Hughes v. Wheeler*, 8 Cow. 77, it was held that a plea by a defendant that he had given the plaintiff his (defendant's) note for the demand in suit, which he accepted, was bad in substance. He should have given the note in evidence under the general issue. *Church v. Gilman*, 15 Wend. 656, was a case calling for the decision of a similar question. There the rejoinders recited the facts at large. The opinion declares that, "facts, and not the evidence of facts, must be pleaded, or the pleading will be held bad as argumentative." It is further said: "The rejoinders are all argumentative. The defendant has pleaded the evidence of the fact of delivery, instead of the fact itself, and for that cause the rejoinders are bad." In *Fidler v. Delavan*, 20 Wend. 57, the court say: "Another defect is, that evidence of the facts charged is spread out in the plea instead of the facts themselves. This is a violation of one of the first rules of pleading, which requires a statement of the facts constituting the plaintiff's cause of action or the defendant's ground of defense. A plea should be direct and positive and not by way of rehearsal or argument, which leads to prolixity and expense."

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Demurrer sustained.

THE BANK OF THE METROPOLIS v. GUTTSCHLICK.

*Supreme Court of the United States. 1840.**14 Peters, 19.*

BARBOUR, J., delivered the opinion of the court.

This is an action of *assumpsit* brought by the defendant in error against the plaintiff in error, in the Circuit Court of the United States, in the county of Washington, and District of Columbia.

The declaration contains three special counts, and a count for money had and received. The three special counts are all founded upon an agreement in writing, which, after reciting that the plaintiff in the court below had bought for the defendant in the court below, lot No. 5, in square No. 489, in the city of Washington, for which he had paid a part of the purchase money, and executed his note for the residue, contains the following stipulation: "The Bank of the Metropolis, through the president and cashier, is hereby pledged, when the above sum (that is, the amount of the note), is paid, to convey the said lot, viz., lot No. 5, in square 489, in fee simple, to the said Ernest Guttschlick, his heirs or assigns forever." Each of these counts avers the payment, at the time agreed, of the amount of the note, and the failure of the bank, on demand, to convey the lot. At the trial several bills of exception were taken, and a verdict was found, and judgment rendered in favour of the plaintiff. To reverse that judgment, this writ of error is brought.

* * * * *

The second objection which was taken, applies to the first count, viz., that the agreement sued on, is averred to have been made by the bank, "through the president and cashier," without averring their authorization by the bank to make it. We consider this objection as wholly untenable. The averment in this count is, that the bank, through these officers, agreed to convey the lot. Now even assuming, for the sake of giving the objection its full force, that the making of this agreement was not within the competency of these officers, as such, yet it was unquestionably in the power of the bank to give authority to its own officers to do so.

When, then, it is averred that the bank, by them, agreed, this averment, in effect, imports the very thing, the supposed want of which constitutes the objection; because, upon the assumption stated, the bank could have made no agreement but by agents having lawful authority. Nay, it would have been sufficient, in our opinion, that the bank agreed, without the words, "through the president and cashier;" for it is a rule in pleading, that facts may be stated according to their legal effect. Now the legal effect of an agreement made by an agent for his principal, whilst the agent is acting within the scope of his authority, is, that it is the agreement of the principal. Accordingly, it is settled that the allegation that a party made, accepted, endorsed, or delivered a bill of exchange, is sufficient, although the defendant did not, in fact, do either of these acts himself, provided he authorized the doing of them. Chitty on Bills, 356, and the authorities there cited. This principle has been applied, too, in actions *ex delicto*, as well as *ex contractu*. In 6 Term Rep. 659, it was held, that an allegation that the defendant had negligently driven his cart against plaintiff's horse, was supported by evidence, that defendant's servant drove the cart. In this aspect of the question, it was one, not of pleading, but of evidence.

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DOUGLASS v. VILLAGE OF MORRISVILLE.

Supreme Court of Vermont. 1910.

84 Vermont, 302.

ROWELL, C. J.: The plaintiffs are contractors, and as such, on July 2, 1906, contracted with the defendant for the labor, materials, and construction of a concrete masonry dam and steel penstock for the improvement of the defendant's electric light and power plant, as per a written agreement of that date, signed by both parties, which, and the specifications thereto attached under which the work was to be undertaken and performed, with certain exceptions, are set out *in haec verba* in the declaration. The only excep-

tion important to be noticed here is the one providing that the work should be performed according to the plans and drawings of such an engineer, which plans and drawings are made a part of the contract.

The action is *assumpsit* to recover the balance due from the defendant for the performance of said contract, and for certain extra work and material required to excavate and fill a fissure in the bed of the river where the dam was to be built, discovered simultaneously by the parties after the contract was executed and the work begun.

The declaration contains four counts. The defendant demurred generally to the first, second, and third by enumeration, and pleaded to the fourth count. The demurrer was sustained as to the first and third counts, and those counts adjudged insufficient; but was overruled as to the second count, and that count adjudged sufficient. * * *

It is objected that the first count is bad because it contains no allegation of a promise by the defendant to pay for the work specified therein, and claimed that such a promise should have been expressly and positively alleged. And it is true that there is nothing in that count that amounts to an express promise by the defendant to pay, though there are allegations of abundant evidence of a *quasi* promise to pay. But that is not enough. There should have been an averment of *assumpsit super se* or its equivalent, for *assumpsit*, without assuming, is no *assumpsit*. Mr. Gould says that whenever the promise is implied, it is declared upon as an express promise, and that upon the face of the record it is always taken to be an express promise; that there is no such thing as an implied promise in pleading, or rather, that the fact of its being implied appears only in the evidence and never upon the record. Gould, Pl. chap. III, § 19. He says in a note to that section that it is held in declaring in *assumpsit* on a bill of exchange against the drawer or a promissory note against the maker, that a statement of the facts that render the defendant liable to pay is sufficient without expressly alleging a promise on his part, the reason assigned being that the drawing of the bill or the making of the note is itself an actual promise, so that alleging the act of drawing or of making is virtually alleging a promise by the drawer or the maker, to pay. He says that whether this rule, as far as it regards the declaration of a bill of exchange (in which the drawer

makes no express promise), is agreeable to the analogies and principles of pleading, appears at least questionable, for in all other cases of *indebitatus assumpsit* the facts stated in the declaration as the ground of the defendant's liability are regarded upon the face of the record only as the consideration of the promise that it alleges and must allege. So Mr. Lawes says that if no express promise is alleged nor other equivalent words used, the declaration will be bad even after verdict, for where the plaintiff declared that in consideration he *would* surrender a term the defendant would pay him so much, it was moved in arrest after verdict for the plaintiff on *non assumpsit* that there was no promise laid and therefore none to be tried, and the court being of that opinion, stayed the judgment. Lawes, Pl. referring to *Buckler v. Angel*, 1 Lev. 164; s. c., 1 Sid. 246; s. c., 1 Keb. 878. *Chandler v. Rossiter*, 10 Wend. 488, is a good illustration of this rule. There the plaintiff declared in *assumpsit* for money paid, etc., omitting the ordinary *assumpsit super se*, but stating instead, the circumstances of his case, namely, that he bought a quantity of fish for the purpose of shipping it to a foreign port; that the defendant put on board the same vessel an equal quantity of fish for the purpose and with the intent of creating a joint adventure so that the parties should share in the profit and loss; and that the fish was so damaged at sea or elsewhere that after it arrived at the port of destination it was sold at a loss, the whole of which the plaintiff sustained and paid without having received any part thereof from the defendant, whereby the plaintiff had suffered damage to such an amount. After verdict for the plaintiff on *non assumpsit*, the defendant moved in arrest for that the declaration was bad in not laying a promise by the defendant. Mr. Wendell for the plaintiff contended that though the declaration was informal it was good after verdict; that it was not a case of defective title, for the agreement was stated, the liability charged, and a promise need not be alleged, for it was enough that the evidence justified the jury in finding a promise. But the court held otherwise and arrested the judgment. The plaintiffs made much the same argument here, and say that in respect of recovery for the extra work sued for, concerning which the promise is not express but implied by law, the test of the sufficiency of the allegations of fact in the count to

show a promise by the defendant is, whether the plea of *non assumpsit* would put those allegations in issue, or, in other words, whether proof of the facts alleged would establish such promise. But that is no test, as shown by the case just cited, for if it would establish such promise, the necessity of a promise in the declaration would not be thereby obviated, for recovery must be had, if at all, according to the allegations as well as according to the proof.

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Judgment affirmed as to the insufficiency of the first count. * * *

FISH v. BROWN.

Supreme Court of Errors of Connecticut. 1845.

17 Connecticut, 341.

STORRS, J.: The only question before us is whether the instrument produced in evidence, on the trial of this cause, was variant from that described in the declaration. The instrument is described as a writing obligatory under the hand and seal of the defendant; on its production, it appeared to be not otherwise executed than by having affixed to it the name of defendant, with a scrawl.

Although the instrument itself states, that it is signed by the defendant, with her hand, and sealed with her seal, it is clear from the authorities, that a scrawl does not, by the common law, constitute a seal; and that, therefore, it did not support the allegation of the declaration, which describes it as being sealed, unless by virtue of the statutes of 1824 or of 1838, each entitled "An Act to conform Deeds and Bonds." By the former, it is enacted, that "all bonds, which have been executed without seal, shall be valid as though the same had been sealed;" and by the latter, that "all instruments, which purport to have been intended as bonds with condition, under seal, which have been executed without seal, shall be valid as though the same had been sealed." *Stat.* 1838, *pp.* 393, 394. The question before us, therefore, depends on the operation of these statutes. As that of 1838 embraces and applies more precisely to the

instrument in question than the other, and does not differ from it otherwise, the former may be laid out of view, as being unnecessary to be considered.

It is a familiar rule of evidence, that it is sufficient to prove an allegation of a fact according to its legal effect. Stark. Ev. Pt. 4, p. 1565. Literal proof is not required. Hence an allegation that a party did a particular act, is satisfied by proof that the act, in legal effect, is his. Thus, an averment that the defendants accepted a bill of exchange, is proved by evidence of an acceptance by their authorized agent. So, in an action by the husband alone, on a bond alleged to be given to him, evidence of a bond to himself and his wife was held to support the allegation, for he had a right to reject the obligation to his wife, and in legal import, it was a bond to himself. *Heys v. Heseltine*, 2 Campb. 604; *Coare v. Gibley*, 4 Esp. Ca. 231. *Ankerstein v. Clarke*, 4 Term R. 616; Stark. Ev. pt. 4, tit. Variance; *Phelps v. Riley*, 3 Conn. R. 266. This principle, in our opinion, applies to the present case, and justifies the admission of the instrument in question in support of the declaration. We have no doubt, from the language of the act of 1838, that it was the intention of the legislature to give to that instrument the same legal effect and operation as it would have had, if it were actually sealed. All instruments not sealed, which purport to have been intended as bonds with condition under seal (which is precisely the description of the instrument in question), are made, or declared to be, valid, as if the same were sealed. The object of the act was doubtless to make the instrument in law what the parties intended it to be, viz., an instrument under seal; and this object was effected, by declaring that it should be valid as though sealed, which from the nature of the case, was the only mode in which it could be, by legislation, accomplished. The terms of the act not qualifying nor restricting such validity, but on the contrary putting the instrument, in this respect, on the footing of those which are sealed, by the most general and extensive form of expression, its true construction is, that the instrument should be valid, as if sealed, to all intents and purposes. It is thus, in legal contemplation and effect, made a sealed instrument; for the effect and operation of an instrument gives it its legal character. We think, therefore, that it is to be treated as if it were sealed, not only in determining the

obligation created by it, but in describing it in pleading. Indeed, we cannot believe, that, when the legislature thus validated these instruments as specialities, it contemplated that they should be treated otherwise than as such, in actions to be brought upon them.

In *Russell v. Hosmer*, 8 Conn. R. 229, 234, this court expressed an opinion in conformity with these views. * * * After remarking, that the instrument on which the action was brought, assumed the form, and had all the solemnities, of a bond, except the seal [the court] add: "This defect is supplied by the statute (of 1824). It is, therefore, to every legal intent and purpose, an instrument under seal." It was not in terms alleged in the declaration to be sealed by the defendant; but it was stated to be his "writing obligatory," which legally imports, and is therefore equivalent to an allegation, that it was sealed; and it is well settled, that in declaring upon a bond, it is sufficient to describe it as a *writing obligatory*, without stating in terms that it was sealed. 1 Chitt. Pl. 364. (9th Am. Ed., 6th Lond. Ed.); 1 Wms. Saund. 291, n. 1., 320, n. 3; *Moore & ux. v. Jones*, 2 Ld. Raym. 1536; *Penson v. Hodges*, 1 Cro. Eliz. 737; *Ashmore v. Rypley*, Cro. Jac. 420; *Van Santwood v. Sandford*, 12 Johns. R. 197; Com. Dig. tit. Pleader, 2 W. 9. 14. That case, therefore, does not materially differ from the present, because it was not there expressly alleged, that the instrument was sealed, since a tantamount averment was made.

A new trial is not advised.

BACON v. PAGE.

Supreme Court of Errors of Connecticut. 1815.

1 Connecticut, 404.

This was an action against Bacon on a promissory note. The declaration stated, "That the defendant, in and by a certain writing or note under his hand, by him well executed, dated the 7th day of June, 1813, promised the plaintiff to pay to him, or order, for value received, the sum of two hundred ninety dollars and seventy cents, as by the

said writing or note ready in court to be shewn appears;" and concluded by averring, "that the defendant, his promise aforesaid not regarding, hath never performed the same, though often requested and demanded; which is to the damage of the plaintiff," etc. The note was as follows: "For value received, I promise to pay Thomas G. Page, or order, the sum of two hundred ninety dollars and seventy cents. Petersburg, June 7, 1813. Joseph Bacon." In the superior court, the defendant made default of appearance, but was afterwards heard in damages. The court assessed the damages, and rendered judgment for the plaintiff. The defendant then brought the present writ of error, assigning for error, that the declaration was insufficient.

SWIFT, Ch. J.: The plaintiff should declare on a contract according to its legal effect, and not on the evidence of the contract. The declaration should shew a consideration, a promise, and a breach of promise. In this case, it does not appear from the declaration that the note had become payable. The defendant might have produced a written agreement that it should be paid at some distant time. The legal effect of such note is, that it is payable on demand. The plaintiff should have so declared upon it; and then the note, when produced in evidence, would have proved the fact, unless the defendant could have proved the contrary; and on such averment the question when the note was payable would have been put in issue. But now no allegation having been made of the time when the note was payable, no evidence could have been admitted on that point. The plaintiff then has declared not according to the legal effect of his contract, but on the evidence only. He has stated no breach of contract. The declaration, therefore, is insufficient.

Such a defect is not aided by default, nor would it have been by verdict.

I am of opinion that judgment ought to be reversed.

In this opinion the other judges severally concurred.

Judgment reversed.

(b) *Legal Conclusions and Evidence.*

MILLVILLE GAS LIGHT COMPANY v. SWEETEN.

Supreme Court of New Jersey. 1906.

74 New Jersey Law, 24.

GARRISON, J.: This is a demurrer to a declaration, the defendant F. B. Sweeten, trading, etc., being the demurrant.

The declaration charges that the defendants Sweeten, etc., under a contract with the other defendant, the city of Millville, for the construction of a sewerage system, dug up certain of the streets of the said city in which the plaintiff had laid gas pipes, which it thereupon became the duty of the said city and its said agent to support, protect and render safe during the construction of the said sewerage system; that in disregard of this duty thus owing to the plaintiff the said pipes were so negligently supported by temporary props and stays that the removal of the earth incident to the digging of the trenches for the sewers caused the plaintiff's pipes to be broken and severed from their connections and to settle unevenly, to the injury of the plaintiff.

It is evident that the foundation of this charge of the negligent performance of a duty owed by the defendants to the plaintiff must be the existence of such duty. If such duty existed it arose from certain facts, and whether upon such facts such duty arose is a question for this court to determine. If this pleading does not display the facts from which a duty was owing to the plaintiff, it makes no case of negligent performance of such duty by the defendants. The only information derivable from the plaintiff's declaration is that its pipes were "laid in the said streets by competent and legal authority." This is the pleader's conclusion, based presumably upon some state of facts known to him. It might not be the conclusion of this court if the same state of facts were made known to it. A pleading is primarily and essentially a statement of facts. Where the facts are stated in a pleading the pleader may, and often should, state the conclusion from such facts upon which he

bases his right,¹⁰ but where the facts upon which the pleader's conclusion is based are not stated his conclusion from such undisclosed facts goes for nothing, and not being in itself a relevant fact is not admitted by a demurrer.

The demurrer in the present case not admitting the plaintiff's conclusion as to its authority to occupy the highway with its pipes, the declaration alleges no foundation for the duty which it charges was owing to the plaintiff, and if it has not charged the existence of the duty it makes out no case for damages for the negligent performance of such duty.

Judgment must be for the defendants.

10. "Though it is in general unnecessary to allege matter of law, yet there is sometimes occasion to make mention of it, for the *convenience or intelligibility of the statement of fact.*" Stephen on Pleading (Tyler's Ed.) 313.

MUSER v. ROBERTSON.

Circuit Court of the United States, Second Circuit. 1883.

17 Federal Reporter, 500.

BROWN, J.: * * *

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The only question, then, is whether the complaints, all of which are in substance as above stated, contain what is technically a sufficient statement of a cause of action. The sufficiency of the pleadings is to be determined by the New York Code of Procedure. This requires a "plain and concise statement of the facts constituting a cause of action." Section 481. But the rule of pleading at common law was the same viz., that facts, not mere conclusions of law, were to be stated. 1 Chit. Pl. 214; *Allen v. Patterson*, 7 N. Y. 478.

The facts essential to be pleaded are, however, the ultimate facts constituting the cause of action, not those other subsidiary matters of fact or law which go to make up the ultimate facts, and are evidences of the latter. There is often considerable doubt whether certain facts shall be taken to be essential parts of the very cause of action itself,

or only evidence of it. To resolve this doubt, recourse is often had to the former rules of pleading, which, by their approved forms, show what are regarded as the ultimate facts constituting the cause of action. On this demurrer it was claimed that the complaint does not state facts, but only conclusions of law. This clearly is not accurate. The complaint in the *Muser case*, which is a sample of most of the fifteen complaints, states that the true duty by law on the goods imported was \$2,483.25; that the collector exacted as duties \$3,049, which the plaintiff was compelled to pay to get his goods, being \$565.25 in excess of the legal duties, which excess he now seeks to recover. The statement of the amount exacted and paid is certainly a statement of pure fact; the only question that can be made is whether the statement that "by law the true duty on said goods was \$2,483.25," is a statement of a conclusion of law merely, or a statement of fact. In my opinion, it should be considered as a statement of one of the ultimate facts in the case, as distinguished from the mere evidences of such fact. What the true duty is depends on a great variety of circumstances. There is no dispute about the letter of the law, but upon the application of different sections of the law; and this may depend upon many circumstances to be given in evidence, such as the kind of goods, their quality, fineness, weight, mode of manufacture, component materials, the relative proportions or value of different component materials, their commercial designation, and numerous other circumstances which may be involved in the determination of the true duty. If the "true amount of duty" is not an ultimate fact to be ascertained, then every circumstance about the goods, which may affect the rate of duty and upon which the determination of the duty depends, must be deemed the ultimate facts necessary to be pleaded; and the result would be a requirement to plead a minute description of the goods in all particulars which might affect the rate of duty. No such pleading has ever heretofore been required or practiced. To require that would be to require, as it seems to me, mere evidence of the one ultimate fact which constitutes the cause of action.

On the rule contended for it would not be sufficient to designate the goods even by their statutory classification, or to allege that they were dutiable at a certain rate, since this classification, or rate, is often the only subject of contro-

versy, and depends on various other circumstances of fact and principles of law. In the *Muser case* the goods are designated as "thread laces"—a statutory classification; but suppose they are in fact black silk laces, and, except in color and material, are precisely the same as white linen thread laces, and are dealt in by the name of thread laces, or black thread lace, while the statute imposes a higher duty on silk laces, or other manufactures of silk. The question of the proper classification would then involve the law of commercial designation and statutory construction, as well, probably, as numerous controverted matters of fact. See *Smith v. Field*, 105 U. S. 52. But no one would, I think, contend that all these details should be pleaded, or that a simple statement, as one of the ultimate facts in the case, that the goods were "thread laces," was not a statement of fact, but a conclusion of law. So, when the rate of duty is affected by the number of threads to the square inch, or the weight, surely these need not be pleaded.

In general, I think, it may be said that a statement is not to be deemed any the less a statement of fact, because its ascertainment may depend upon some principles of law applicable to various other facts and circumstances. Thus a plea of payment is a plea of fact of the simplest form; yet it may involve very nice questions of law and fact, arising from the legal rules concerning the application of payments upon the particular circumstances of fact that may be proved in the case. So a statement that A sold and delivered goods to B is plainly a statement of fact for the purposes of pleading, although on the trial the issue turns out to be one of law, whether, under the particular facts proved, the transaction was a sale, or a mortgage, or a bailment or a loan. *Norton v. Woodruff*, 2 N. Y. 153; 4 N. Y. 76.

The chief ultimate facts which in this class of cases constitute the cause of action are that the true, or legal, or lawful duty—it is immaterial in which form stated—was a certain sum, and that the collector exacted a certain larger sum; or, in a single phrase, that the collector on a certain importation exacted a certain sum of money in excess of the legal duty. How that legal duty is arrived at, *i. e.*, the methods and rules of law and various circumstances of fact by which that legal duty is ascertained and determined, are all subordinate questions, and are only evidence lead-

ing to the one ultimate fact of the illegal exaction of a given sum of money.

This view is sustained by the form of action sanctioned by long usage in such cases. At common law, and under the statutes of this country, it has been held that an ordinary count in *indebitatus assumpsit* for money had and received, is an appropriate mode of declaration to recover back an excess of duties exacted on the importation of goods. *City of Philadelphia v. Collector*, 5 Wall. 720, 726, 731; *State Tonnage Tax Cases*, 12 Wall. 204, 209; *Elliott v. Swartwout*, 10 Pet. 137; 2 Greenl. Ev. § 121. The exaction of money beyond the legal rate, whether for duties, tolls, or taxes, is the one ultimate fact which in law constitutes the receipt of the money to the use of the person illegally compelled to pay it. All the other facts and circumstances of the case, and any principles of law applicable to them, and determining their effect or construction, are only subsidiary, and evidences of the one ultimate fact to be proved, viz., the unauthorized exaction of a certain sum of money.

* * * * *

* * * The demurrers must, therefore, be overruled, with liberty to withdraw them, and answer, if desired, within twenty days; the order to be settled on notice.¹¹

11. *Instances of Legal Conclusions*.—That money is or is not due; that certain acts constitute a contract; that there was not a sufficient consideration for a promise; the mere averment of fraud, mistake, conspiracy or undue influence; that a party's conduct was arbitrary, illegal, reasonable or wrongful; that due notice was given; that an officer was duly appointed or was disqualified; that a party was released from liability; that a contract was waived, abandoned or rescinded; that acts, instruments or proceedings were lawful or valid; that a party is estopped or was justified; that an event is likely to occur. See 31 Cyc. 52-65, where the foregoing and many other legal conclusions are given, with citation of numerous authorities.

BENHAM v. EARL OF MORNINGTON.

Court of Common Pleas. 1846.

3 Manning, Granger & Scott, 133.

Debt, on a bond, bearing date the 23d of August, 1833, in the penal sum of 800*l*.

Plea, that the supposed writing obligatory in the declaration mentioned, was made and executed by the defendant

as therein mentioned, in parts beyond the seas, to wit, at Calais, in the kingdom of France, where the defendant was then resident and domiciled, and not elsewhere; that the said writing obligatory in the declaration mentioned, was not taken, received, made or passed by any public officer or officers of the said kingdom of France, authorized by the laws of that kingdom so to do, nor was the same writing written throughout by the hand of the defendant; that, although the defendant signed the said writing with his own hand, yet the defendant did not, in any part of the said writing, write with his proper hand the formula or acknowledgment styled in the French tongue a "*bon*," or "*approuvé*," bearing in words at length the debt or sum of money purporting to be secured or acknowledged by the said writing, nor was the defendant, at the time of the making of the supposed writing obligatory, a merchant or tradesman, artisan, husbandman, ploughman, vine cultivator, labouring man, or servant; and that, by reason of the premises, the said supposed writing obligatory, by the laws of the said kingdom of France, never was nor is obligatory or binding on the defendant, but always was and is of no force, effect, or validity-verification.

Special demurrer, assigning for causes, that the plea did not state facts with distinctness and certainty, so that the court could perceive that the writing obligatory was void according to the law of France at the time it was executed.

* * * * *

TINDAL, C. J.: It appears to me that this plea is bad for one of the causes assigned, viz., that it is argumentative and inferential only; whereas "every plea must be direct, and not by way of argument or rehearsal," as is laid down in Co. Lit. 303a. It is perfectly clear, that, but for the words at the end—"by reason of the premises, the said supposed writing obligatory, by the laws of the said kingdom of France, never was, nor is, obligatory or binding on the defendant, but always was, and is, of no force, effect, or validity"—the plea would be no answer to the action. There is no direct affirmance of what the law of France is, or of any state of facts to bring this case within the operation of that law. I think the plaintiff was entitled to a distinct statement of the law and of the facts, in order that he might take the opinion of the court as to whether or not they amounted to a legal defense. If this had been a

question of evidence, instead of pleading, the witness would not have been allowed to state, negatively, this or that is not in compliance with the law of France; but he would have been required to show affirmatively, from his own experience, or from knowledge derived from some recognized code or book, what the law is. The entire plea, after the introductory statement of the defendant's domicile, consists of negative propositions only. With respect to the allegation that the defendant was not a merchant or tradesman, etc., how do we know that there are not other classes embraced by the exception, that are not noticed by the plea, and to one of which the defendant may belong? I think the plea is clearly argumentative and bad. * * *

COLTMAN, J.: The plea could hardly have been held sufficient if it had alleged merely that the bond was executed by the defendant in France, and that, by the laws of that country, the bond was void: and, unless such a plea would be sufficient, I think the matter that is here intermediately stated would not help it. The plea should have alleged distinctly what the law of France is, and should then have averred facts to bring the case within it; so that the matter might be decided by the court on demurrer, if the facts did not bring the case within the French law. * * *

CRESWELL, J.: I also am of opinion that the plea in question is insufficient. I quite agree with my brother Coltman, that a plea merely averring that the bond was executed in France, and was void by the laws of that country, would be bad. The French law is only to be taken notice of as any other matter of fact, and must be pleaded: it clearly would be no plea to say, that, "by reason of some fact that will hereafter be proved," the bond is null and void. It has been insisted, on the part of the defendant, that this plea does sufficiently state what the French law is. I think there is no such clear and unambiguous statement of it as the plaintiff has a right to have upon the record: it is a mere inferential, and a very inconvenient, mode of stating what the foreign law is. * * *

*Judgment for the plaintiff.*¹²

12. In *Jenness v. Simpson* (1908) 81 Vt. 109, the allegation was as follows:—"And the defendant avers that on September 24th, 1906, for a long time previous thereto, ever since and now, it was and is the law of the State of South Dakota that a husband and his wife may legally contract with each other in the manner set forth in said contract." This was held bad on demurrer, as not setting forth the law of South Dakota but only pleader's conclusion in regard to it.

(c) *Alternative Allegations.*

BIRMINGHAM RAILWAY, LIGHT AND POWER
COMPANY v. NICHOLAS.

Supreme Court of Alabama. 1913.

61 Southern Reporter, 361.

The following are the counts of the complaint referred to in the opinion:

“(4) Plaintiff claims of defendant \$10,000 as damages for that heretofore, on, to wit, August 2, 1911, defendant was a common carrier of passengers for hire and reward, operating electric cars for such purpose in Jefferson county, Ala. And plaintiff avers that at the time aforesaid in, to wit, the town of Brighton, a municipal corporation, in said county and State, she was at or near a regular station or stopping place of defendant, where defendant's cars were accustomed to stop for the purpose of taking on and letting off passengers, and that she was at or near such station for the purpose of taking passage on one of defendant's cars. And plaintiff avers that there was at said time a valid ordinance of the said town of Brighton, making it unlawful for cars to run within the corporate limits of said town at a greater rate of speed than six miles per hour, and that at the said time and place, which was within the corporate limits of the said town of Brighton, one of defendant's cars was running at a greater rate of speed than six miles per hour in violation of said ordinance, and that as a proximate consequence of such greater speed than six miles per hour of the said car the plaintiff was run into and knocked down by the same, and as a proximate consequence received great personal injuries, suffered great physical pain and mental anguish to her damage aforesaid, and was put to great expense for doctor's services and medicines, and was permanently made less able to work and earn a livelihood to her damage as aforesaid, for which she sues.”

(7) Same as 4 down to and including “Jefferson county, Ala.,” and adds: “And plaintiff avers that she was at the time and place aforesaid at or near the defendant's car

track at or near East Brighton station on defendant's line at a point where a public street or thoroughfare or crossing of said town, which was constantly used by a large number of people in passing to and fro at this point, crossed the same, and the plaintiff says that the motorman in charge of said car knew of plaintiff's position of peril, yet, notwithstanding such knowledge, ran the said car with wanton negligence at a high and dangerous rate of speed over the said crossing, and against or so near to the plaintiff that she was knocked or thereby caused to fall into a ditch or culvert, as a proximate consequence of which she received great personal injuries, suffered physical pain and mental anguish, was made sick and sore, put to great expense for doctor's services and medicines, and nurse's hire in and about the curing and care of her said injuries, and was permanently disabled and disfigured, all as a proximate consequence of the wanton negligence of the motorman in charge of said car as aforesaid."

"(8) Plaintiff claims of defendant \$10,000 damages for that heretofore, on, to wit, the 2d day of August, 1911, the defendant was a common carrier of passengers for hire and reward, operating cars propelled by electricity for such purpose in the town of Brighton, a municipal corporation, in Jefferson county, State of Alabama. And plaintiff says that at the time and place aforesaid she was standing at or near the defendant's car track at or near East Brighton on defendant's line at a point where a public thoroughfare or street or other crossing crossed the said track, and that said thoroughfare or street or crossing was constantly and continuously used by a large number of people passing to and fro across the said track at said point. And plaintiff avers that, while she was so standing at the said time and place, the defendant negligently ran one of its cars against or so near the plaintiff at said street, or thoroughfare, or crossing, at a high and dangerous rate of speed, that plaintiff was thereby knocked or caused to fall into a culvert or ditch, as a proximate consequence of which she received great personal injuries, has suffered great physical and mental anguish, and was disabled for a long time from working and earning money, and has been permanently made less able to work and earn money, was made sick and sore, and has been put to great expense for doctor's services, medicines, nurse's hire, and proper diet, all as a

proximate consequence of the negligence of the defendant in negligently running its said car against or near the plaintiff at a high and dangerous rate of speed at said crossing aforesaid, for which she sues."

MAYFIELD, J.: Appellee sued appellant to recover damages for personal injuries. The wrongful act alleged is that appellant's motorman ran a car against or so near to plaintiff that she was knocked, or thereby caused to fall, into a ditch or culvert. In two counts the wrong was alleged to be due to simple negligence, and in the other it is denominated wantonness.

The place of the injury—that is, the *locus in quo*—is alleged to be at or near East Brighton station, on defendant's car line, at or near the defendant's car line, at a point where a public street or thoroughfare crossed the same. In one count (count 4) it is alleged that plaintiff was at this point for the purpose of taking passage on one of defendant's cars. In the other counts it is not alleged for what purpose plaintiff was at this point. In no count is it alleged that plaintiff was on the track or in dangerous proximity thereto, except inferentially, according to an alternative that the car struck her. According to the other alternative, she may have been at safe distance from the track, but, on account of fright was caused to fall into the ditch or culvert. In none of the counts is it made certain whether plaintiff was walking along or near to the defendant's car track, or whether she was crossing it, or whether she was traveling along the public street or thoroughfare, or whether she was merely crossing such street or thoroughfare, or whether she was standing still, or was loitering on or at the crossing of the street car track and the street or thoroughfare. It is not made to appear whether the street car track is laid along so as to form a part of the street or thoroughfare, or whether it merely crosses the street or thoroughfare. While it is alleged that there is a crossing of the street car track and the street, it is not alleged whether the crossing is at grade, or above or below grade. In other words, it is left wholly to conjecture whether the plaintiff was a trespasser on or near the defendant's track at the time of the injury. The allegations to show this fact are extremely indefinite and uncertain. Some of the alternative allegations, standing alone, clearly show that she was a trespasser at the time of the injury, while others leave

it in doubt whether she was a trespasser or was rightfully at the place where she was injured. Mr. Gould, Pleading, § 51, p. 80, says: "An important requisite in all pleading is certainty. This requisite implies that the matter pleaded must be clearly and distinctly stated, so that it may be fully understood by the adverse party, the counsel, the jury and the judges, and especially (as regards the declaration) that the defendant may be enabled to plead the judgment, which may be rendered in the cause, in bar of any subsequent action for the same cause; for if a vague or partial description of the matter in controversy, in a given case, were allowed, and in a subsequent suit of the same thing the declaration should contain a full and precise description of it, the cause of action, though actually the same in both cases, would not appear from a comparison of the two records to be so."

The object and purpose of good pleading is to disclose, and not to conceal, the real issue to be tried. The rules of pleading are to be tested, as well as dictated, by good sense and sound logic. The science of pleading is only a means for obtaining the ends of justice. Attempts to evade or conceal the real issue, or attempts to stifle justice in the webs of form, each merits no more countenance than the underlying rules of law compel the court to accord. It would be a deplorable condition of the law of pleading if the plaintiff could file a count or a complaint good against all proper or appropriate grounds of demurrer, yet leaving it impossible for the defendant or the court to know of what particular wrong or injury the plaintiff complains. While a plaintiff, under our system of pleading, may join two or more causes of action in several separate counts, he cannot so join them in one count. A plaintiff is not allowed, against an appropriate demurrer, in a single count, to allege in a doubtful and uncertain manner two or more distinct and incongruous causes of action, in order to hit some possible cause of action that he may be able to prove on the trial. The defendant has the right to be informed of the particular cause of action for which he is sought to be held liable in each count.

At common law alternative averments were not allowed in civil or criminal cases, and some courts held that the error was not cured by a verdict. * * * In *Dusenberry's Case*, 94 Ala. 418, 419, 10 South. 274, 276, it is said:

“Alternative averments of matters of substance are destructive of all certainty in the formation of definite issues for trial. The prime object of the successive steps in pleading under our system is to evolve such issues so that they may be presented pointedly and distinctly. * * * Under our system, ‘all pleadings must be as brief as is consistent with perspicuity, and the presentation of the facts, or matter to be put in issue, in an intelligible form; no objection can be allowed for defect of form, if the facts are so presented that a material issue in law or fact can be taken by the adverse party thereon.’ Code, § 2664. It cannot be said of a complaint that it is perspicuous, or that it presents the facts in an intelligible form, so that a material issue may be taken thereon by the defendant, unless it contains a clear and distinct statement of the facts which constitute the cause of action, so that they may be understood by the party who is to answer them, by the jury, who are to ascertain the truth of the allegations, and by the court, who is to give judgment. 1 Chitty on Pleading (16th Am. Ed.) 256. * * * When the plaintiff, in a single count, shifts his right of action from one ground to another, and states several branches of duty in the alternative, or disjunctively, so that it is impossible to say upon which of several equally substantive averments he relies for the maintenance of his action, then there is such confusion and obscurity as to the ground upon which a recovery is claimed that the defendant is not clearly informed of the matter to be put in issue; and a count so substantially variant and contradictory in its allegations is demurrable.”

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In the case of *Porter v. Hermann*, 8 Cal. 619, 623, 624, FIELD, C. J., later Justice of the Supreme Court of the United States, said: “The allegation of the complaint is that the money was ‘collected and received by the defendant as the agent, or attorney in fact, of the plaintiff.’ This is, in substance, an allegation that the defendant collected the money as agent, or, if he did not collect it as agent, then he collected it as attorney in fact. If the defendant can be charged in this alternative form, he may with the same propriety be charged in the disjunctive form with the collection of the money in every character and capacity specified, thus: That the defendant was in possession of the

money collected and received by him as attorney or factor, or broker, or agent, or clerk of the plaintiff, or in some other fiduciary capacity. Under no system of pleading would such alternative or disjunctive allegations be permitted. Stephen, in his *Treatise on Pleading*, lays down as rules that: 'Pleadings must not be insensible, nor repugnant, nor ambiguous, nor doubtful in meaning, nor argumentative, nor in the alternative, nor by way of recital, but must be positive in their form.' Pages 377, 388. Van Santvoord, in his *Treatise on Pleading*, under the Code of New York, says: 'It was also and still is a rule that pleadings must not be either alternative or hypothetical, as where it was charged that the defendant wrote and published, or caused to be written and published, a certain libel. This was held bad for uncertainty.' Page 200."

Mr. Gould (*Pleading*, p. 14) says that: "Pleading is, practically, nothing more than affirming or denying, in a formal and orderly manner, those facts which constitute the ground of the plaintiff's demand and of the defendant's defense. Pleading, therefore, consists merely in alleging matter of fact, or in denying what is alleged as such by the adverse party. But in the theory or science of pleading the averment of facts on either side always presupposes some principle, or rule of law, applicable to the facts alleged, and which, when taken in connection with those facts, is claimed by the party pleading them to operate in his own favor; for all rights of action, and all special defenses, result from matter of fact and matter of law combined. And hence in every declaration, and in all special pleading, some legal proposition (i. e., some proposition consisting of matter of law), though not in general expressed in terms by the pleader (because the court is supposed judicially to know it), is always and necessarily implied, or, to use the language of grammarians, understood."

These fundamental rules of pleading find application when applied to counts, 4, 7, and 8 of this complaint, and the objection was taken by appropriate special demurrer. Each count of this complaint is very indefinite, uncertain, on account of the alternative and disjunctive averments. It is uncertain whether the plaintiff was a passenger, or entitled to the care and protection of a passenger, or whether a trespasser or a licensee. It is uncertain whether she was at the station as a passenger, or whether she was

only near there with the intention of later becoming a passenger, or, if near the station with such intention, how near or how far. It is also uncertain whether she was on the track when injured, or when the wrongs complained of were committed, or was only near the track, and, if only near, how near or how far therefrom. It is likewise uncertain whether she was near enough the track to be struck by the car, or whether only near enough to be frightened and caused to fall. The right of passengers and the rights of trespassers, as against common carriers, are not the same, but quite different. The duties and liabilities of common carriers to passengers and those to trespassers are likewise very different. Again, the rights and duties of persons rightfully on a railroad track are different from the rights and duties of those wrongfully thereon and who are thereby trespassers; and the duties and liabilities of the railroad company are likewise different as to each class.

All persons have the right to cross a railroad track, but they have no right to loiter thereon, nor use the track as a passway longitudinally, unless the track is laid at grade, so as to form a part of the public highway. So the duties and liabilities of railroad companies are different as to those who are rightfully crossing its track and to those who are wrongfully walking along it, or even loitering on or wrongfully using it at a public crossing.

These principles of law have been so frequently announced by this court that it is useless to cite the cases.

So many material allegations in counts 4 and 8 are alleged in the alternative or by disjunctive averments—and some of the alternatives not stating good causes of action—that it renders them subject to the demurrer interposed. The rule in this State on this subject is well expressed as follows: “The count being in the alternative, and in this way attempting to present two causes of action in the same count, it is the well-established rule that both alternatives must present a cause of action, or the count will be held to be bad. In other words, in such case the count can be no stronger than its weakest alternative, and, if one of the alternatives fails to present a cause of action, the count will be held to be bad. 4 Ency. Pl. & Pr. 620; *Central of Ga. Ry. Co. v. Freeman*, 134 Ala. 354, 32 South. 778.” *Sloss-Sheffield Steel & Iron Co. v. Sharp*, 156 Ala. 288, 47 South. 280.

One of these alternatives of count 4 would make this case only that plaintiff was near defendant's station for the purpose of taking passage on one of its cars, and was run into by one of its cars. This, it will be seen, in no wise negatives the fact that plaintiff was a trespasser on the track, and alleges only simple negligence, as for the violation of a municipal ordinance. There is no attempt to allege that plaintiff in this case was crossing the track, or that she was in a public highway; but for aught that appears she was walking along, or loitering upon, the defendant's track, or attempted to board the car while the same was in motion at this high rate of speed, in violation of the ordinance. Construing the count against the pleader, as we must do, it shows that plaintiff was a trespasser, and therefore does not state a good cause of action. *Shewning's Case*, 93 Ala. 27, 9 South. 458.

One of the alternatives of the eighth count would make this cause only that plaintiff was near East Brighton station, and near defendant's car track, and that defendant's car was negligently run close to her, and caused her to fall into a ditch or culvert. It therefore wholly fails to show any breach of duty owing the plaintiff. While it is alleged in this count that "the point at which plaintiff was injured was where a public thoroughfare or street or other crossing crossed said track," it is not alleged that plaintiff was rightfully there—that is, that she was traveling the street or thoroughfare and was crossing the track—but the count affirmatively alleges that she was "standing at this crossing."

While a pedestrian has the right to cross a railroad track at a public crossing, he has no right to stand upon or obstruct it or to loiter there. * * *

If the count could otherwise be justified on the ground that plaintiff was in or traveling along a public street or thoroughfare, it would be rendered bad by the use of the last alternative—"or other crossing." In other words, it is possible that, if plaintiff was in a public highway, she might not be a trespasser, but if she was in a way, running along and across the car track, which was not public and was used only by trespassers, no matter how often or how frequently, she would still be a trespasser. The error in pleadings of using a general or comprehensive term in the alternative, preceded by the phrase "or other," was at an

early date pointed out by this court, even where the very words of the statute were used. In *Raiford's Case*, 7 Port. 104, the statute "prohibited the sale, in quantities less than a quart, of rum, brandy, whisky, tafia, or *other spirituous liquor*." Raiford was indicted for selling "*spirituous liquors*" without specifying the kind of liquor. This court held the indictment bad. "In pleading it is not enough to aver the existence of such *other acts or means* in the language of the statute; but the pleader must, in addition to the statutory, generic phrase, specify the acts or means under a *videlicet*. Example. Under our former statute against retailing, if the pleader wished to proceed for the sale of ardent spirits other than 'rum, brandy, whisky, or tafia'—these being all the kinds specified in the statute—he should have averred that the defendant sold spirituous liquors, to wit, gin, etc., or words of similar import." *Johnson v. State*, 32 Ala. 585. In the case just quoted from the defendant was indicted for obstructing a public road "by a fence bar, or other impediment." The court held that the use of the phrase "or other impediment," though it was the exact language used in the statute, was bad, notwithstanding the statute expressly allowed alternative averments as to the means by which an offense was committed.

The use of the word "near," as related to dangerous agencies, has been several times considered by this court. It has been held to be bad as an alternative, when used alone with "at," "on," or "under" a dangerous agency, such as a falling roof or wall or falling rocks, etc.; but if accompanied with the qualifying word "dangerously" or "negligently," with averments of knowledge of the danger, on account of the proximity, it has been held to be good. See *Simmerman's Case*, 170 Ala. 553, 54 South. 426; *Merriweather's Case*, 161 Ala. 441, 49 South. 916; *Mills' Case*, 149 Ala. 474, 42 South. 1019; *Black's Case*, 59 South. 497. The correctness of these rulings is, we think, well illustrated by this case. "On" a railroad crossing is, of course, a dangerous place; but "at" or "near" such crossing or track is not necessarily dangerous. It all depends upon how near the track one is, as to whether he is within the zone of danger or that of safety. A point one foot from a railroad track or from a public street which crosses the

track may be said to be either "at" or "near" the crossing. A point fifty feet from the railroad track or from the public street would likewise be at or near, or certainly near, the crossing, yet one would be dangerously near a passing car, while the other would not be. A person in one foot of a car track is within the danger zone of passing cars, while one fifty feet from the track is not, but is within the safety zone. To say that a person is "at or near" a railroad station or "at or near" its track, without more, does not show that such person is within the danger zone of passing trains, or that those in charge of passing trains or cars owe him any duty.

* * * * *

The seventh count was treated by the pleader and by the trial court as stating a cause of action as for wantonness. Its sufficiency as a count of this character was properly tested by appropriate demurrer, and sustained by the trial court. In this ruling there was manifest error. The count is not good as a wanton count under the rules laid down by this court, in that it does not show, except as by a mere conclusion of the pleader, that the plaintiff was in a position of peril, or that the motorman knew of her peril. The facts upon which the conclusion is based are set out, and they do not support the conclusion of the pleader. As before stated, a person near a street car station or track is in a perilous situation or not, according to his proximity to the track, and according to whether he sees, or can see, approaching or passing cars. This doctrine was early announced by this court in *Tanner's Case*, 60 Ala. 621, 642, and has been many times followed. In that case Mr. Tanner was riding along the track. The court said: "Unlike animals, often found on railroad tracks, Mr. Tanner was an intelligent human being, knew the speed and momentum of railroad trains, and should have got off the track. Doubtless he intended to do so. He possibly miscalculated his ability to reach the crossing just ahead of him. The persons in charge of the train, perceiving by his movements that Mr. Tanner knew of their approach, were justified in supposing he would leave the track before they would come up with him. The testimony, in which there is no material conflict on this question, shows that there were points at which he could have done so with safety. The law does not require that trains shall be stopped, or

checked up, when persons of discreet years are seen on the track, unless, from their position or movements, or other cause, it can be inferred that they are not apprised of the approaching danger, or, from some other cause, they are unable to leave the track. Such requirements of railroads would greatly impede their business, and would do them a great wrong." The rule is different, of course, as to infants of tender years and as to persons who are disabled by infirmity from getting out of the way, or who are unconscious of their danger; but neither of those cases is before us, and we are not attempting to state the law in such cases.

* * * This count does not allege that the injury was willfully or wantonly inflicted, as it might have done, but it attempts to set forth the facts upon which the wantonness is based, and the facts alleged do not show wanton or wilful injury. Everything alleged shows, at best, only simple negligence. You cannot change a given fact by calling it harsh names or by gratuitously adding violent expletives or epithets to its real name. * * *

It therefore follows that the trial court erred in overruling the demurrers as to each of these three counts; and for this error the judgment is reversed and the cause is remanded.

Reversed and remanded.

ANDERSON, McCLELLAN, SOMERVILLE, and DE GRAFFENRIED, JJ., concur. DOWDELL, C. J., dissents as to counts 4 and 7.

(d) Recital.

BROWN v. THURLOW.

Court of Exchequer. 1846.

16 Meeson & Welsby, 36.

Case for slander. Declaration stated, for that whereas the defendant, contriving, etc., heretofore, to wit, on, etc., in a certain discourse which the defendant then had of and concerning the plaintiff, in the presence and hearing of divers good and worthy subjects of the Queen, falsely and maliciously spoke and published of and concerning the

plaintiff the false, scandalous, and malicious, and defamatory words following: "Bill Brown, (meaning the plaintiff,) you are a sheep-stealer. I can prove you are a sheep-stealer at any day or one time." The declaration then alleged special damage to the plaintiff, by means of the premises, in his trade and business of a cattle dealer.

Special demurrer, assigning for causes, that the defendant is not by the said declaration positively charged with having committed the grievances in the declaration mentioned, but it is therein alleged by way of recital only, that the defendant has committed the said grievances, and not directly and positively, as it ought to have been; and that nothing is directly or positively affirmed or charged in the said declaration; and also that it does not appear by the said declaration that the words, "Bill Brown (meaning the plaintiff), you are a sheep-stealer," etc., were spoken or published of or to the plaintiff. Joinder in demurrer.

* * * * *

POLLOCK, C. B.: The word "whereas" overrides the whole of this declaration, including the special damage, as if it had been repeated, and has not been exhausted. The gravamen of the charge is only stated by way of recital and inducement, nor is any positive averment interposed till the concluding one, that the plaintiff brings his suit. That is a defect available to the defendant on special demurrer. The declaration is, therefore, bad on special demurrer.

PARKE, B.: I entirely concur. In trespass, the matter complained of is positively averred without a preceding "whereas;" and though in the action on the case recitals generally occur, there must, notwithstanding, be a positive averment of the cause of action. Here the plaintiff does not positively or directly aver the cause of his action. This defect is, in reason, equally contrary to the true principles of pleading, whether it occurs in case or trespass. Had it appeared by a long course of precedents, that averring the cause of action by way of recital, and not positively or directly, had been considered sufficient, a form of pleading thus established would have bound us; but, in the absence of any such authority, the clear principles to the contrary must prevail.

ALDERSON, B., concurred.

* * * * *

Judgment for the defendant.

SECTION 5. SEPARATE COUNTS.

HANDY v. CHATFIELD. *Take**Supreme Court of New York. 1840.**23 Wendell, 35.*

Demurrer to declaration. The plaintiffs declared in covenant, setting forth, in the first place, an indenture of lease, in ordinary form, of certain premises, reserving an annual rent of \$1,200, payable quarterly, and then alleging that after the making of the lease, and during the term thereby granted, it was covenanted and agreed by the defendants by an endorsement in writing made on the lease, signed and sealed by them, that in consideration that the plaintiffs had erected an additional building on the demised premises, they would pay to the plaintiffs a further rent of \$524 in addition to the rent reserved in the lease; that they would pay such rent quarterly, as specified for the rent reserved in the lease; that the plaintiffs should have the same remedies for the collection of the additional rent as if it had been originally reserved in the lease, and that such additional rent should be computed and commence from 1st November, 1836. (The term demised by the original lease commenced 1st May, 1835, and the quarter days for the payment of rent were the first days of August, November, February, and May.) The plaintiffs then allege a breach of the indenture of lease, and of the covenant endorsed thereon, in the nonpayment on the 1st February, 1839, of the sum of \$531, the rent for three months of the term, commencing 1st November, 1838. The defendants demurred, and assigned for cause of demurrer, the joining of two distinct causes of action in one count.

By the Court, BRONSON, J.: The count is bad for duplicity; the objection pointed out by the demurrer. The plaintiffs have, in a single count, set out two distinct contracts, and alleged a breach which goes to both. Although both of the covenants relate to nearly the same subject-matter, and the plaintiffs have attempted to treat them as though they constituted but a single contract, it is impossible to deny that the count is framed upon two several deeds, and

the claim is to recover damages for the breach of both of the contracts. Profert is properly made of both deeds; and it is clear that the defendants might plead *non est factum* to each of them; and there may be other grounds of defence as to one of the covenants, which do not exist in relation to the other.

There is no precedent for this mode of declaring, and it would be likely to prove highly inconvenient in practice. Where the plaintiff has several distinct causes of action, of the same nature, he is allowed to insert several counts in his writ and declaration, for the very reason that the pleading would be bad for duplicity if they were all inserted in one count.

If the second contract had provided for the payment of the rent originally reserved, as well as the *additional* sum of \$524, an action might then have been maintained upon that covenant for the whole sum, and only one count would have been necessary. But the second contract goes only to the further or additional rent of \$524, and the plaintiffs cannot recover the whole debt without counting upon both deeds.

In this case, the pleader might, in one count, have set out the original lease, assigning for breach the nonpayment of the rent reserved by that deed; and then, in a *second count*, after stating the original lease, either at large or by a proper reference to the first count, he might have set out the covenant endorsed on the lease, and assigned for a breach the nonpayment of *the additional rent* of \$524, provided for by that instrument. The covenant endorsed on the lease was in itself a distinct and complete contract for the payment of a specified sum of money, although it may be necessary to look into the other instrument to which it relates for the purpose of more fully understanding the true nature and scope of the undertaking. Such a course is often necessary where one written instrument refers to another; but that does not prove that both instruments can be regarded as a single contract.

The stipulation in the second contract that the plaintiffs should have the same remedies for the collection of the additional rent as if it had been originally reserved in the lease, cannot alter the form of the remedy. Taken literally, the clause may mean, that the additional rent should be recoverable in an action on the lease alone, which is im-

possible. But the parties probably intended nothing more than that the additional sum mentioned in the second contract should be regarded as rent, and might be recovered as such, as effectually as though it had been originally reserved in the lease. We do not refuse to give effect to the agreement. We allow the plaintiffs to sue for, and recover this additional sum as rent—giving them as perfect a remedy as though the whole sum had been reserved in the lease; but in pursuing the remedy the plaintiffs must not depart from the established forms of pleadings. It is the business of the legislature and the courts to regulate the forms in which judicial proceedings shall be conducted; and those forms cannot be controlled by any stipulation of the parties, as, for example, an agreement that an action of *covenant* may be maintained on a contract by *parol*, or that two distinct causes of action may be inserted in one count.

The modern practice in the action of *indebitatus assumpsit* of inserting several debts in one count, as for goods sold, money lent, etc., proved nothing in favor of this declaration. If the *assumpsit* count is examined, it will be seen that the several debts are only stated as the consideration for a *single* promise. Although there are several considerations, only *one* contract is alleged. But here the plaintiffs have counted upon *two* contracts.

We are referred to the rule in pleading which allows a party in his complaint or defence to allege several distinct facts; but that is subject to the qualification, that they must all tend to a single point, or connected proposition. If the different facts make out more than one cause of action or ground of defence, the pleading will be bad for duplicity.

Judgment for defendants.¹³

13. Commingling two causes of action in the same count, while commonly deemed a fault in pleading, is not usually called duplicity. Indeed there does not seem to be any appropriate word by which it may be conveniently designated in distinction from duplicity proper.

Can't plead 2 contracts in one count

DEVINO v. CENTRAL VERMONT RAILROAD COMPANY.

Supreme Court of Vermont. 1890.

63 Vermont, 98.

Case for the negligence of the defendant. The declaration contained three counts. The defendant demurred generally to all the counts, and especially to the first and second counts. [Each of these counts alleged a derailment of defendant's train resulting in the injury of the plaintiff and the death of his wife.] ¹⁴

* * * * *

POWERS, J. * * *

* * * * *

The first count is specially demurred to on the ground of duplicity.

Duplicity is defined to be the joinder of different grounds of action to enforce a single right of recovery. Gould Pl. Chap. 4, § 99. Here the ground or cause of action is the negligence of the defendant.¹⁵

14. Condensed statement of facts by the editor.

15. DUPLICITY in the declaration is usually defined as in this case.—Stephan says:—“Its meaning * * * is, that the declaration must not, in support of a single demand, allege *several distinct matters*, by any one of which that demand is sufficiently supported. * * * The following is an example: The plaintiff declared in debt on a penal bill, by which the defendant was to pay ten shillings on the 11th of June, and ten shillings upon the 10th of July next following, and ten shillings every three weeks after, till a certain total sum were satisfied by such several payments, and by the said bill the defendant bound himself for the true payment of the said several sums in the penal sum of seven pounds, and the plaintiff alleged that the defendant did not pay the said total sum, or any part thereof, upon the several days aforesaid; whereby an action had accrued to him to demand the said penalty of seven pounds. This was held bad for duplicity. For, if the defendant had failed in payment of *any one* of the sums, such failure would alone be a breach of the condition, and sufficient to entitle the plaintiff to the penalty he claimed; and the plaintiff ought, therefore, to have confined himself to the allegation of the non-payment of one of those sums only. * * *

“The object of this rule being to enforce a single issue, upon a *single subject of claim*, admitting of several issues where the claims are distinct, the rule is, accordingly carried no farther than this in its application. The declaration, therefore, may, in support of *several demands*, allege as many distinct matters as are respectively applicable to each. Thus, let one of the examples above given, with respect to the declaration, be so far varied as to substitute, for the case of an action in debt on a penal bill for the penalty accrued in consequence of non-payment of a sum by several installments, the case of an action of covenant, on a covenant to pay that sum by similar installments. In this latter case the plaintiff might, without

This negligence was the common source of disastrous consequences both to the plaintiff and to his wife, as much as if a person strike a blow which hits two persons at the same time. There is then only one *ground* of action stated in the count.

Does it seek to enforce anything but a "single right of recovery?"

In *Guy v. Livesey*, Cro. Jac. 501, there was a count in trespass for an assault and battery upon the plaintiff *and* upon his wife *per quod consortium uxoris amisit*. After verdict a motion in arrest was filed based upon the ground that the count was double. But all the court held that the action was well brought, for as to the battery of the wife the plaintiff sought no recovery but only for the loss which he suffered by reason of that battery upon the wife.

If a battery be inflicted upon the wife the damages to the husband springing from the loss of the wife's society and services, are the husband's exclusive personal damages. In a count merely to recover such damages all the allegations showing the battery to the wife should be set forth as they would be, in a count in favor of the husband and wife to recover for the damages to the wife for the battery.

A count seeking a recovery for the husband's damages for loss of the wife's services consequent upon a battery of the wife, can be joined in a declaration with a count for damages resulting from a battery upon the husband alone. 1 Chit. Pl. 73; 1 Salk. 119; Selwyn N. P. 286.

If in a single count nothing but damages personal to the husband and arising at the same time and from the same cause, are sought, how can they be treated as anything but the result of a "single right of recovery."

duplicity, declare that the defendant 'did not pay the said total sum, or any part thereof, upon the several days aforesaid.' For he does not, as in the action on the penal bill, found upon such non-payment a single claim, viz., the claim to the penalty of seven pounds; there being no penalty in question his claims are multiplied in proportion to the non-payments; that is, he is entitled to ten shillings in respect of the first default, and ten shillings more upon each of the rest; the allegation of several defaults is, therefore, in this case, the allegation of so many distinct demands and consequently allowable." Stephen on Pleading (Tyler's Ed.) 242-245.

This definition is doubtless the correct one, and is supported by the cases generally.—*Reid v. Carrall* (1850) 8 U. C. Q. B. 275; *Higson v. Thompson* (1851) 8 U. C. Q. B. 560; *Orr v. Cooledge* (1902) 117 Ga. 195; *Henry v. Heldmaier* (1907) 226 Ill. 152; *State v. Commercial Bank* (1857) 33 Miss. 474; *Platt v. Jones* (1871) 59 Me. 232; *Dunning v. Owen* (1817) 14 Mass. 157; *Peoples Nat. Bank v. Nickerson* (1910) 106 Me. 502; *Ferguson v. The National Shoemakers* (1911) 108 Me. 189.

But at all events the objection to the first count amounts to this, that the plaintiff in this count asks for more damages than he is entitled to. If he cannot recover for the consequential damages he may for those done by the battery upon himself.

The count is not demurrable because the plaintiff claims too many items of damage. 1 Chit. Pl. 349; *Bayles v. Kan. Pac. R. R. Co.*, 13 Col. 181, 5 L. R. A. 480; *Bayles v. Glenn*, 72 Ind. 5; *Moritz v. Splitt*, 55 Wis. 441.

The judgment is reversed. The demurrer is sustained as to the 2nd and 3d counts and overruled as to the 1st count and that count is adjudged sufficient. The cause is remanded with leave to replead, to both parties.

HIGHLAND AVENUE AND BELT RAILROAD COMPANY v. DUSENBERRY.

Supreme Court of Alabama. 1891.

94 Alabama, 413.

WALKER, J.—Demurrers to the three counts contained in the original complaint having been sustained, a fourth count was added by amendment. This count avers, in substance, that on the 16th day of November, 1889, the plaintiff's intestate was an employee of the defendant as a section hand on its railroad, and as such employee was rightfully on one of the defendant's hand cars, and while he was riding on the same, and engaged in the line of his employment, another hand car was being run and moved over and along said line of road, each of said cars being under the superintendence and control of the foreman in charge, and running at a high and reckless rate of speed, and in close and reckless proximity to each other, so that by the carelessness and gross negligence of the foreman in charge, in directing or allowing said cars to run at such a high rate of speed, and in such close proximity the one to the other, the same collided, or the rear car ran into the front car, throwing or knocking plaintiff's intestate between said cars, and thereby inflicting injuries from which he died. The portion of the complaint just summarized states a cause of ac-

tion based upon the carelessness and gross negligence of the foreman as the person having the superintendence and control of both hand cars.

~~But the complaint does not stop here.~~ Immediately following the averments already mentioned, there are additional allegations to the effect, that said injuries were caused by reason of the negligence of some person or persons in the service or employment of the defendant, who, at the time of said injuries, had the charge or control of the running, moving or operating of the rear hand car; and that one or both of said hand cars were in a defective and worn condition, that the brakes or cog wheels of one or both of said cars were in a bad and defective condition, and that said injuries were caused by reason of the defect in the condition of the ways, works, machinery or plant connected with or used in the business of the master or employer, and said defect arose from, or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer and intrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition; that the defects aforesaid were known to, or could have been known to the defendant, by the exercise of reasonable diligence; and that said injuries were caused by reason of the negligence of some person or persons in the service or employment of the defendant who had the superintendence of the moving of said rear hand car intrusted to them at the time of said injuries, and whilst in the exercise of such superintendence. The result of the allegations is, that the death of the plaintiff's intestate is in one count successively attributed (1) to the gross negligence of the foreman in charge or control of both hand cars; (2) to the negligence of some person or persons in charge or control of the running, moving or operating of the rear hand car; (3) to the defective and worn condition of one or both of the hand cars, which defect had arisen from, or had not been discovered or remedied owing to the negligence of the defendant, or of some person in its service who was intrusted by it with the duty of seeing that the ways, works, machinery or plant were in proper condition; and (4) to the negligence of some person or persons in the service or employment of the defendant who had the superintendence of the moving of the rear car, whilst in the exercise of such superintendence.

We do not construe the complaint to charge that the several acts of negligence were concurrent, co-operating causes, and that all of them together contributed to the alleged injury, so that each specification is to be regarded as an integral feature in the description of the mode in which the injury was inflicted. If that construction could be put upon the complaint, the plaintiff would be in the position of having stated his case with unnecessary particularity, and he would not be entitled to recover unless his proof made out the case with equal particularity of description. *Smith v. Causey*, 28 Ala. 655; *L. & N. R. R. Co. v. Johnston*, 79 Ala. 436; *C. B. & Q. R. R. Co.*, 88 Ill. 431; *L. & N. R. R. Co. v. Coulton*, 86 Ala. 129; 1 Greenl. Ev. §§ 57 *et seq.* Here, the several specifications of negligence are stated as disconnected defaults, and each one of them seems to be put forward as a separate ground of liability, independent of the others.

* * * * *

In the present case, several distinct breaches of duty, each constituting an independent cause of action, are alleged in one count. Neither of the specifications of negligence could be stricken out, or disregarded as surplusage, or as immaterial or impertinent matter; for each of them is an essential part of one or several causes of action, upon either of which as well as upon another the plaintiff may rely. Nor can that which is one count in form be treated as several independent counts which could be pleaded to separately; for the averments are linked together in one continuous narrative; the several allegations of negligence are all made in connection with and in reference to a single statement of the fact of injury; the circumstance of the death of the plaintiff's intestate is averred only once, but the defendant's liability therefor is rested upon several independent grounds, stated distributively. A cause of action is shown by coupling the averment of injury with either of the specifications of negligence; yet the allegations as to the several independent breaches of duty are so mingled together that they cannot be singled out and met separately. but issues must be made upon all of them at once by any single plea which would answer the whole of the one count of the complaint. If the plaintiff is entitled to a recovery upon proof of only one of the causes of action, then equally substantive averments in the same count are ignored, and

the practical effect is to treat the several averments of breaches of duty as if they were made in the alternative, so that the plaintiff may select any one of them and not abandon the rest, though, as they are all in one count, they must all be met by the same plea or pleas.

Alternative averments of matters of substance are destructive of all certainty in the formation of definite issues for trial. The prime object of the successive steps in pleading, under our system, is to evolve such issues so that they may be presented pointedly and distinctly. If, on the other hand, the proof must sustain all the specifications of negligence, the result is to require proof of several independent causes of action, to sustain one recovery. It is quite usual in actions for torts, where a single act or transaction is complained of as the cause of the alleged injury, to insert several counts stating that act in varying shapes to meet different phases of the proof as it may be developed, and to charge in the successive counts different breaches of duty as separate grounds of recovery. Each count is treated as the statement of a distinct cause of action, and appropriate issues may be pleaded to them severally. *Mau-pay v. Holley*, 3 Ala. 103. The separation into counts serves the double purpose of supplying apt averments to meet varying phases of proof, and at the same time presenting material issues singly and not jumbled together. * * *

In the present case, a plea of contributory negligence on the part of the plaintiff's intestate, though it would present a good defense to several of the causes of action stated, yet would, perhaps, be insufficient as an answer to the whole count, because one of the separable grounds of recovery is the alleged gross negligence and recklessness of the foreman in charge of the two hand cars. Likewise, a plea setting up a state of facts which would relieve the defendant of liability for the alleged injury if it was caused by reason of a defect in machinery, would not be a good answer to the count, because it would not meet other issues wholly foreign to this one. In short, if several independent causes of action may be so joined in one count that they may be regarded either as stated in the alternative or as putting upon the plaintiff the burden of proving averments which are not joined together as parts of the description of a single transaction, then the defendant is put to the answer of a multiplicity of equally material issues at once, and no

steps in pleading can reduce the contention of the parties to a single material issue. Inextricable confusion of issues would result from the blending in one count of a number of distinct breaches of duty as independent grounds of recovery, to be chosen from and relied on at the election of the plaintiff. Perspicuity and certainty in his pleadings are not exacted of the plaintiff, if he is permitted to put forward in one count several independent causes of action, stated in such ambiguous terms as to leave the defendant wholly in doubt as to what alleged breach of duty is really made the ground of the charge of liability. The defendant is entitled to be clearly and distinctly informed of the facts relied upon as the basis of recovery against him. The count which was added by amendment in this case was uncertain and ambiguous in stating several independent causes of action without disclosing which one was relied upon to support the plaintiff's claim, and the demurrer pointing out the defects in the complaint should have been sustained.

Reversed and remanded.

CUNNACK v. GUNDRY.

Court of King's Bench. 1819.

1 Chitty's Reports, 709.

Bayley on a former day obtained a rule to show cause why the declaration in this case, which contained ninety-eight counts upon as many one-pound country banker's promissory notes should not be referred to the master to consolidate the said counts upon all the promissory notes for the like sum, and to strike out such other superfluous matter as the master should think fit.

Chitty now showed cause, and contended that it was not possible to sustain this motion, which was without a precedent. It is not possible, as was suggested, to frame a declaration alleging, "that the defendant heretofore, to-wit, on, etc., made divers, to wit, ninety-eight promissory notes, and that by each and every of them respectively he promised to pay the sum of one pound." *Vide James v. Shore*, 1 Stark. 426. There was indeed a similar motion

made in *Lane v. Smith*, Tidd (6th Ed.), 648; and 3 Smith, 113, but was refused. The declaration in that case contained two hundred and eighty-six counts, and the court said that each of the notes being a special and distinct contract, it was impossible to state several of them in one count.

ABBOTT, Ch. J.: Could not the object be gained in this way. Supposing the party making the application should consent to enter into a rule, that all the notes except one shall be given in evidence under the count, upon an account stated either before the master, or before the jury, as shall be agreed upon, and that the defendant shall bring no writ of error for want of a special original.

Bayley and *Chitty* agreed to this arrangement, and accordingly

The rule was made absolute, "that it be referred to the master to strike out all the counts except the first, the defendant thereby undertaking to permit all the other notes to be given in evidence, either before the master or a jury upon the count upon an account stated, and that he would not bring any writ of error, and that the costs of the other counts and of this application should be costs in the cause."

NEWBY v. MASON. *Jake*.

Court of King's Bench. 1822.

1 Dowling & Ryland, 508.

Adam moved for a rule to show cause why it should not be referred to the Master to strike out certain superfluous counts in the plaintiff's declaration. It was an action for alleged bribery at the Camelford election; the declaration contained two hundred and ten counts. One set charged the defendants with procuring the corruption of, and the other with corrupting persons to vote at the election. He insisted, therefore, that as the evidence which would support one set of counts would support the other, he declaration contained superfluity, which was fit matter for reference to the Master.

BAYLEY, J., at the time the motion was made, said, that procuring the corruption, and corrupting, might be differ-

ent offences; for instance, giving a man money to vote a particular way might be one offence, and giving him money not to vote at all might be another, so that different sets of counts in the declaration might require different evidence.

The court, however, granted a rule *nisi*; and

Merewether now showed cause against the rule, and insisted that unless the counts alleged to be superfluous were introduced vexatiously, the court ought not to interfere; and whether there was vexation or not was a question proper for the court only to decide, and ought not to be referred to the Master. For this he cited *Wilkins v. Perry*, Hardw. 129.

Sed per Curiam. This is a case to go to the Master, who will decide whether the plaintiff has introduced the superfluous counts vexatiously or not.

Rule absolute.

GODFREY v. BUCKMASTER.

Supreme Court of Illinois. 1838.

2 Illinois, 447.

SMITH, J., delivered the opinion of the court.

This was an action of *assumpsit* brought in the Madison Circuit Court.

The plaintiff counted on six several promissory notes, made payable at the same time, for the sum of one thousand dollars each, and included the whole of the notes in a single count of the declaration. The count describes the notes according to their tenor and legal effect, and assigns the breach of the promise to pay as to each and to the whole of the notes.

To this declaration the defendants specially demurred, and assigned for cause a want of form by joining the notes in the same count. The circuit court, holding the demurrer not well taken, overruled it, and rendered final judgment for the plaintiff. A writ of error has been prosecuted, and it is now assigned for error: First, that the declaration contains different and distinct causes of action in one count, and that this count is therefore double; * * *

It is now argued by the counsel for the plaintiffs in error, that although the several and distinct promises of the defendants could be joined in one action, yet the promises being several and distinct they should have been declared on in separate and distinct counts.

To this position, it may be remarked, that the present case is not one of a misjoinder of causes of action so different in their nature as to fall within the rule which would render a declaration bad because of such joinder; nor can we perceive how it is a cause even for special demurrer for want of form.

* * * * *

There is no misdescription, no incongruity or want of accuracy or certainty in the count which is even formally perfect; and hence the cause of demurrer assigned is not established. We are entirely satisfied that no valid objection can be raised to the count.

The six notes are identical with each other, being for the same sum, of the same date, and payable at the same time, and might well be joined in the same count most conveniently, without ambiguity or perplexity. Indeed it is most desirable, where it can be done without producing confusion, when the causes of action are of the same nature and may be clearly set forth together, that this mode of declaring should be adopted. No possible embarrassment can arise, for the defendant may avail himself of every defense. He may plead specially to each note separate matters of defense, or he may plead the general issue and give special matter in evidence in defense to any or to all the notes. Suppose, instead of the six notes, there had been but one payable by installments on six different days, would it be objected that the promises and breaches could not be set forth in the same count? We apprehend not. The promises then being on separate pieces of paper will not surely change the rule nor the reason of it, nor can the count be double because it describes several notes. The description of the six notes in separate counts would have been no more clearly nor accurately described than they have been in one, and the useless verbiage which would, in framing them, have to be observed is thus desirably avoided.

The authorities cited by the counsel for the plaintiffs in error, and particularly those in Gould's Pleading, are

far from sustaining the ground assumed in support of the writ of error, while those in the 4th and 13th Johnson's Reports, clearly sustain the court. In our system of practice it is of infinite importance to introduce precision and conciseness; and whatever tends to dispense with prolixity and useless recapitulation, should be encouraged.

* * * * *

The judgment is affirmed with costs.

Judgment affirmed.

Take

RAWLINSON v. SHAW.

Supreme Court of Michigan. 1898.

117 Michigan, 5.

[Defendant agreed to publish a book which plaintiff agreed to write, and after a large part of the manuscript had been prepared, defendant wanted to be released from the contract. The parties were unable to agree, and arbitrators were selected and certain proceedings were had relative to an arbitration. The book was never published. The declaration consisted of several counts, the first being a special count on the original contract, alleging the defendant's promise and the consideration upon which it rested, the offer of plaintiff to do his part, the breach by defendant and a claim for damages.]¹⁶

LONG, J.: * * *

* * * * *

The second count avers:

"And for that whereas the said defendant, on November 24, 1896, at the city of Grand Rapids, said county, was indebted to the plaintiff in the sum of \$300 upon and by virtue of an award there made by G. A. Buell, O. R. Wilmarth, J. S. Valentine, C. A. Shackleton, and W. G. Beckwith, arbitrators chosen by and between the parties, on a submission in writing theretofore made on, to wit, April 13, 1896, by the plaintiff and the defendant, to the award and determination of the said arbitrators, concerning cer-

16. Condensed statement of facts by the editor.

tain matters in difference then and there depending between the plaintiff and the defendant, upon which said reference the said arbitrators then and there awarded that the defendant should pay the plaintiff the said sum of money, to wit, \$300."

To these are added the common counts in *assumpsit*.
• • •

The cause came on for trial before a jury in the Kent Circuit Court. After the opening statement by plaintiff's counsel, and before any testimony was taken, he was asked by counsel for defendant:

"You make reference to two arbitrations, which you say these parties had taken steps to set aside. Do you claim anything under either of these arbitrations?"

"A. We do not care to announce ourselves on the thing until the proofs are in. We may or may not. It depends on the evidence in the case. * * *

The Court: I think, if those two counts are allowed to stand, we are trying two cases in one."

The motion was therefore granted compelling plaintiff's counsel to elect upon which count they would proceed, and they elected to proceed upon the first count. This ruling raises the first question presented.

The court was in error in compelling the plaintiff to elect. Upon the face of the declaration two distinct rights of action were alleged—one upon the contract, and the other upon the award. The second count upon its face purports to disclose a distinct right unconnected with that stated in the other. *Assumpsit* could have been brought to enforce the award, which is alleged in the second count. The two counts could have been joined. Even upon the supposition that the court was advised by the opening of counsel that the second count was for the same cause of action as stated in the first count, yet we think the court was in error in compelling counsel to elect. One of the objects of inserting two or more counts in one declaration, when in fact there is but one cause of action, is to accommodate the statement of the cause, as far as may be, to the possible state of the proofs to be exhibited on the trial, or to guard, if possible, against the hazard of the proofs varying materially from the statement of the cause of action, so that, if one or more of the several counts should not be adapted to the evidence, some other of these may be so. The plaintiff has

in every case a right to insert in his declaration as many counts (each one being in itself single) as he pleases. It appeared on the trial that the claimed award grew out of the same contract. (If the proofs showed that the award was binding between the parties, then the plaintiff could not recover on the contract. If it turned out, however, on the trial, that the award for any reason could not be enforced by either party, the plaintiff had the right to stand upon his first count.) In *Mather v. Day*, 106 Mich. 371, the trial judge submitted the question of the validity of the award to the jury, with the instruction that, if they found the award binding, they had nothing to do with any matters involved in the controversy covered by the contract. On appeal to this court it was said:

"We think it was proper to submit to the jury, under the circumstances, the questions arising under the submission and award. It is evident from the finding of the jury that they were unable to compute the award from the statement furnished, and therefore disregarded the award entirely, and entered upon the consideration of the general account between the parties."

A case nearly in point to the question here is *Sadler v. Olmstead*, 79 Iowa, 121. It appeared that plaintiff in his first count declared upon a contract for hay sold, and sought to recover the contract price. In another count he set up an arbitration and award for the same hay. It was held that the plaintiff had the right to state his cause of action in this way in different counts.

* * * * *

The judgment must be reversed, and a new trial awarded.

Take

HITCHCOCK v. MUNGER. ✓

Superior Court of Judicature of New Hampshire. 1844.

15 New Hampshire, 97.

Debt, qui tam, under the statute against usury.

The first count alleged that on the 26th day of February, 1839, one Samuel Richardson made his promissory note to the defendant, for the sum of three hundred dollars, upon

which note there were three indorsements, the dates of which were specified in the count, and that afterwards, on the 8th day of April, 1841, Richardson and the defendant made a corrupt agreement, by virtue of which Richardson paid the defendant the sum of fifteen dollars, for forbearance and giving day of payment of the sum due on the note, over and above the rate of six per cent., contrary to the form of the statute, etc., by reason whereof the defendant forfeited the sum of forty-five dollars, being three times the amount of the usury; one-half to the use of the county, and one-half to the use of the plaintiff.

^{NOTE} The second count alleged that on the said 26th day of February, 1839, said Richardson gave his other promissory note to the defendant, of like date and amount, and payable in the same manner, at the rate before mentioned, upon which note were payments made by the said Richardson similar to those upon the note first described. The corrupt agreement etc., was then stated, as in the first count.

The defendant pleaded that he did not owe the plaintiff and the county of Sullivan in manner and form, etc.

* * * * *

The jury returned a general verdict for the plaintiff, which the defendant moved to set aside. * * * He also moved in arrest of judgment, on account of the insufficiency of the second count in the declaration.

GILCHRIST, J.: Where there are several counts in a declaration, whether the subjects of them be *really* distinct, or identical, they must always purport to be founded on distinct causes of action, and not to refer to the same matter. *Stephen on Pleading* (2nd Ed.), 318, 319. This is rendered necessary by the rule against duplicity, the object of which is to insure the production of a single issue upon the same subject-matter in dispute. 1 Ch. Pl. 259. This rule, though evaded as to the declaration, by the use of several counts, is not permitted to be directly violated. Where there are several counts, they are for all purposes as distinct as if they were in different declarations, and they must severally contain all necessary allegation. But a party has a common-law right to introduce several counts into his declaration, in fact for the same subject-matter of complaint, and varying from the first count only in statement, description, or circumstances. 1 Ch. Pl. 451.

• • • In a second count upon a deed or agreement, it is proper to aver that a certain other deed or agreement was made between the parties, containing the like terms and stipulations as are contained in the deed set forth in the first count. 1 Ch. P. 450, note (h).

The second count in the declaration before us refers to the first count with as much particularity as the law and authorities require. We are of opinion that it is sufficient, and that the motion in arrest of judgment should be overruled.¹⁷

• • • • •

17. But where there are several prior counts differently worded, it is not enough to use the expression "as aforesaid" without indicating which prior count is referred to.—Gilmore v. Christ Hospital (1902) 68 N. J. L. 47.

Take **MARDIS' ADM'RS v. SHACKLEFORD.** ✓

Supreme Court of Alabama. 1844.

6 Alabama, 433.

This was an action of *assumpsit* by the defendant in error, against the plaintiffs. The declaration contains eight counts, on the first six of which issues of fact were joined, and to the seventh and eighth, the defendants demurred seriatim. The seventh count alleges that the defendant's intestate was an attorney at law, practicing in several inferior and superior courts of this State, and at his request the plaintiff placed in his hands obligations and evidences of debt due from divers persons resident in the same, amounting in the aggregate to the sum of fourteen thousand three hundred and fifty-three dollars and fifty-four and one-fourth cents—all of which are particularly described by a statement of the names of the debtors, the amount, and when due. In consideration of the premises, and a reasonable fee to be paid to the intestate for his services, he undertook to collect the obligations and evidences of debt, and pay the amount thereon received, to Henry Hitchcock, in the discharge of certain demands in his hands against the late firm of Burke, Shackelford & Co., of which the plaintiff was a partner. The breach alleged is, that the intestate did not proceed to recover the money due and owing to the

plaintiff on the obligations, etc., and pay over the amount in discharge of the claims existing against Burke, Shackelford & Co., as it was his duty to do; but wholly failed to collect and pay over the same, etc.; and by such neglect, the plaintiff has been prevented from collecting the obligations, etc., and has been altogether deprived of, and wholly lost the same. The declaration then concludes with a deduction of the intestate's liability, and a promise by him to pay, etc.

The eighth count, instead of describing the evidences of debt placed in the intestate's hands, merely declares that they are identical with those mentioned in the third and seventh counts, * * * The demurrer to each count was sustained. * * *

COLLIER, C. J. * * * *

It is objected to the eight count, that it does not describe the claims which the intestate received for collection, but merely refers to the third and seventh counts, and adopts the description contained in the third and seventh counts. The several counts of a declaration are regarded as its different parts or sections (Step. on Plead. 267) and in framing it, unnecessary repetition should be avoided. This may be done by the counts referring to each other; but unless such reference is made, one count will not be aided by another; "for though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations; and consequently, they must independently contain all necessary allegations, or the latter count must expressly refer to the former." (1 Saund. on Plead. and Ev. 417). In *Ryder v. Robins*, 14 Mass. Rep. 284, the first count concluded that the defendant, "though often requested has never paid, etc., but neglects and refuses, etc.," but the second containing no averment or anything equivalent: *Held*, that the allegation of the first might be applied to the second count. And in *Dent's Adm'r v. Scott*, 3 Har. & J. Rep. 28, it was considered to be sufficient for one count to set out a consideration, and for the other counts seeking to enforce a contract founded upon the same consideration to refer to it. Each count, it was said, need not contain a complete declaration in itself, but by a reference to another, its defects would be supplied. The case of *Maupay v. Holley*, 3 Ala. Rep. 103, is entirely consistent with the authorities cited. That was an action of *assumpsit*, and the declaration contained two counts, in each of which the contract was

stated differently. The court said, "Where a declaration contains several counts, each count is considered as the statement of a different cause of action; and where issue is taken upon all, the plaintiff is entitled to recover, upon proving the allegations of either." The citations made are directly in point, and in recognizing them as authoritative we necessarily attain the conclusion that the objection to the eighth count is not well taken.

* * * * *

Without extending this opinion to greater length, we would merely remark that we consider the seventh and eighth counts as entirely unexceptionable. The judgment is consequently affirmed.¹⁸

18. Such reference is sufficient even though the prior count which is referred to is held bad on demurrer. (Anniston Elec. Co. v. Elwell (1905) 144 Ala. 317) or has been abandoned (Robinson v. Drummond (1854) 24 Ala. 174; Jones v. Vanzandt (1851) 5 McLean (U. S.) 214; Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Rice (1892) 48 Ill. App. 51; contra, Richardson v. Lanning (1855) 26 N. J. L. 130, where count stricken out).

SECTION 6. JOINDER OF CAUSES OF ACTION.

DALSON v. BRADBERRY. ✓

John

Supreme Court of Illinois. 1869.

50 Illinois, 82.

WALKER, J., delivered the opinion of the court.

Appellee commenced an action of trespass on the case against appellant, to recover for an injury to his reversionary interest in a tract of land held and occupied by a tenant under a lease from him. The declaration averred that, he being the owner and entitled to the reversion of the land, appellant, without leave and against the will of appellee, threw down and destroyed a large amount of fence, by hauling away the same, whereby the crop became exposed to cattle and other stock, and was thereby destroyed, whereby appellee became and was injured, and sustained damage.

Subsequently, on leave granted by the court, appellee filed an additional count. In it he proceeds for a trespass quare clausum fregit, and avers that appellant, with force

and arms, broke and entered the close, and threw down and hauled away appellee's fences, by reason of which the grass and herbage were consumed and destroyed, to appellee's damage.

A trial was had, which resulted in a verdict in favor of appellee, whereupon appellant entered a motion for a new trial, which the court overruled, and rendered judgment on the verdict. The case is brought to this court on appeal, and we are asked to reverse the judgment on several grounds.

It is urged that there is such a misjoinder of causes of action as renders the judgment erroneous. A misjoinder of causes of action renders a declaration bad on demurrer, and this, too, without regard to the perfection of the counts in themselves. The law of pleading prohibits such a joinder, and hence the objection may be reached in that mode. It is not only subject to a demurrer, but it is bad in arrest or upon error. 1 Chit. Pl. 205, 8 Am. Ed. from the 6 Lond. Ed. It has, however, been held, that in some cases the misjoinder will be aided by intendment, as by taking damages under but one count, or by entering a remittitur of damages so as to recover but for one cause of action, or where the verdict is for the plaintiff on the counts well joined, and for the defendant on the others. *Knightly v. Birch*, 2 Maule & Sel. 533. But in this case there was a general verdict, and, for aught we can see, the jury may have found damages under both counts.

It then remains to see whether case and trespass may be joined in the same declaration. Chitty lays down the rule, that assumpsit, covenant, debt, or account, cannot be joined with each other, nor trespass with case, for they are actions of distinct natures, and the judgments are different, that in trespass being, in strictness, *quod capiatur*, and that in case, *quod sit in misericordia*. Ib. 201; 1 Tidd's Prac. 10 Am. Ed. and note. It is laid down as a rule, that whenever the same process and judgment may be had on two counts, they may be joined, otherwise they cannot be. *Duke of Bedford v. Alcock*, 1 Wils. 248. It has also been said, that where the same plea may be pleaded, and the same judgment rendered on different counts, they may be joined. *Brown v. Dixon*, 1 Term. R. 274. Notwithstanding there are various rules stated by different judges, by which to determine when different causes of action may be joined, they all agree that

the judgments must be the same. And we have seen that they are not in trespass and case. It, therefore, follows, that there was error in joining these counts, and we have seen that the defect may be reached, on demurrer, in arrest or upon error.

In this view of the case, we deem the consideration of the other grounds urged for a reversal as unnecessary.

The judgment of the court below must be reversed and the cause remanded.

*Judgment reversed.*¹⁹

19. The courts have found great difficulty in fixing upon a satisfactory test to determine the right of joinder of causes of action. The best historical synopsis of the matter is given by Tidd as follows:—

“Wherever several counts may be joined in the same declaration, for different causes of action, there is always the same process by original writ, and in general the same plea or general issue, and the same judgment. And hence, rules have been framed, in order to determine what different counts may or may not be joined in the same declaration, from the similarity of the process, the plea, and the judgment. In one case, it was said by LEE, Ch. J. that the true way to judge of this matter is, that whenever the process and judgment are the same on two counts, they may be joined; otherwise they cannot. But it being found that the similarity of the process afforded but a very fallible criterion, there being the same process of summons, attachment and distress, in actions of *account, covenant, debt, annuity, and detinue*, and the same process of attachment and distress in actions of *assumpsit, case, and trespass*, none of which can be joined, it was said in a subsequent case, by WILMOT, Ch. J. that the true test to try whether two counts can be joined in the same declaration, is to consider and see whether there be the same judgment on both; and if there be, he thought they might be well joined. But in a later case, the court of Common Pleas were of opinion, that the rule or test to try whether two counts can be joined, as laid down in the former one, was rather too large, and not universally true; and the reason for this opinion probably was, that there is the same judgment, for damages and costs, in actions of *assumpsit, covenant, case and trespass*, and the same entry of a *misericordia* in the three first of these actions, and yet no two of them can be joined. Therefore, in a still later case, a new criterion was substituted; and it was said by BULLER, J. to be universally true, that wherever the same plea may be pleaded, and the same judgment given, on two counts, they may be joined in the same declaration. But even this rule is not altogether unexceptionable; for it is clear that *case and trespass* cannot in general be joined, although the same plea of not guilty of the premises will serve for both, and there is the same judgment in each for damages and costs; and though in general the judgment in *trespass* is *quod capiatur*, and in actions upon the *case, quod sit in misericordia*, yet sometimes there is an entry of a *capiatur* in *case*, as well as in *trespass*. It should also be observed, that this rule is merely affirmative; and it does not hold *e converso*, that different counts cannot be joined, unless there be the same plea and judgment on all of them; for it is holden, that *debt* on record, specialty and simple contract, may be joined, although they require different pleas; and in *debt and detinue*, which may also be joined, not only the pleas, but the judgments are different. The nature of the causes of action therefore should be attended to, in order to determine whether different counts may or may not be joined in the same declaration; and, with the exceptions which have been noticed, it may safely be laid down as a general rule, that wherever the causes of action are of the same nature, and may properly be the subject of counts in the same species of action, they may be joined, otherwise they cannot.” 1 Tidd’s Practice, 11.

BOERUM v. TAYLOR.

*Supreme Court of Errors of Connecticut. 1848.**19 Connecticut, 122.*

[Plaintiff declared in two counts. In the first he alleged a trespass *vi et armis*, whereby the defendant took a certain jug containing a quart of rum, which was owned and possessed by the plaintiff, and put into said jug tallow, hair, soap suds and other noxious substances, and thereby both the jug and the rum that was in it were rendered of no value to the plaintiff. The second count alleged the putting of the same noxious substances into the jug for the purpose of inducing the plaintiff to drink them, and that the plaintiff, supposing the jug to contain rum, drank the said mixture and became sick.] ²⁰

CHURCH, Ch. J.: * * *

* * * * *

2. The only question which we deem important in the case, is, whether in this declaration there is a misjoinder of counts? The first count is in trespass, for an injury to the property, and the second in case, for a consequential injury to the person, of the plaintiff. By the common law, these counts cannot be joined. * * *

* * * * *

And it makes no difference, in this respect, that by a proper form of averment the plaintiff might have recovered under the first count for the injury described in the second. The causes of action still are distinct and different. And it is not uncommon, in actions of trespass *vi et armis*, that by way of aggravation, the plaintiff recovers damages for that, which alone considered, would furnish a good cause of action in case: as in trespass *quare clausum fregit*, the plaintiff may recover for the seduction of his wife or daughter; or as in the case of *Barnum v. Vandusen*, 16 Conn. R. 200, for the damage sustained by the communication of a deadly and contagious disorder to his sheep. But in all such cases, to justify a recovery in aggravation, the facts and circumstances must be averred, as a ground of recovery, specially and with reasonable particularity. 1 Chitt.

Pl. 386. 1 Saund. 346. *Treat v. Barber*, 7 Conn. R. 275; *Barnum v. Vandusen*, 16 Conn. R. 200; *Bracegirdle v. Oxford*, 2 Mau. & S. 77; 2 Greenl. Ev., par. 273.

In the present case, no allusion is made in the first count to any matter of aggravation; but the plaintiff relies for a recovery for the injury to his person, upon the additional special facts alleged in the second count, as for a distinct ground of complaint.

There is, therefore, in our opinion, a misjoinder of counts in this declaration. * * *

Judgment affirmed.

HOWE v. COOK. ✓

Supreme Court of New York. 1839.

21 Wendell, 29.

By the Court, BRONSON, J.: In actions against bailees, attorneys and others for negligence or misconduct in the discharge of their duty, the plaintiff may in general declare either in *case* or *assumpsit*. The *gravamen* may be alleged as consisting either in a breach of *duty* arising out of an employment for hire, or a breach of *promise* implied from the consideration of hire; and other counts may be joined belonging to that form of action which the plaintiff elects to pursue. *Govett v. Radnidge*, 3 East, 62, 70; *Church v. Mumford*, 11 Johns, R. 479. Mr. Chitty gives precedents for declaring in both forms, and advises the pleader to frame his principal count in such a manner that a count in *trover* or one in *indebitatus assumpsit* may be joined, as the circumstances of the case may require.

Although the plaintiff has two modes of framing his principal count, and the evidence to support the declaration may be the same in both cases, yet other counts can only be joined when they belong to that form of action which the pleader adopts. In actions against a carrier, the plaintiff cannot declare in *case* for a loss of the goods, and add a count in *assumpsit* for money paid, or the like; nor can he declare in *assumpsit* on the implied undertaking to carry safely, and add a count in *trover* for the conversion of the

property. And so of actions against other bailees. It is not enough that the counts may all relate to the same *subject-matter*; the *form of action* must be the same in all. *Brown v. Dixon*, 1 T. R. 274; 1 Chit. Pl. 196-7.

The two first counts in this declaration are plainly founded upon *contract*. They set forth a *promise* and the breach of it, as the cause of action. The pleader has followed substantially the precedents for declaring in *assumpsit* against the hirer of a horse for riding it improperly, etc.; and where this form is adopted, the common *indebitatus assumpsit* counts may be joined. 2 Chit. Pl. 145, 148. The addition of a count in *trover* was a fatal misjoinder.

* * * * *

The manner in which the breach is alleged does not determine the form of the action. In *assumpsit*, it is not unusual after setting out the contract, to allege for breach that the defendant *contriving and fraudulently intending* to injure the plaintiff, did not regard his promise, but *craftily and subtly deceived* the plaintiff, etc.; and this form is often followed, not only in actions against bailees and others where case would also lie, but in cases where *assumpsit* is the only remedy. In declaring upon contracts, it is always a sufficient breach to show that the defendant did not perform his engagement; and if the plaintiff goes further and alleges that the defendant *fraudulently and deceitfully* violated his promise, it neither changes the form of the action, nor varies the proof to be given on the trial. Lawes' Read. in Assump. 259; *Evertson v. Miles*, 6 Johns. R. 138.

Judgment reversed.

STOYEL v. WESTCOTT. ✓

Supreme Court of Errors of Connecticut. 1807.

2 Day, 418.

BY THE COURT: Amos Westcott, Jr., brought his action on the case against Isaac Stoyel and William Carder; averring that he was legally deputed to serve an attachment which issued against Stoyel in favour of Job Smith, was

signed by Thaddeus Learned, justice of the peace, and directed to the said Westcott as an indifferent person: that by virtue of the writ, he arrested the body of Stoyel, at the house of Carder; and that Stoyel and Carder, with a fraudulent intent to rescue the said Stoyel from the custody of the said Westcott, and procure him an opportunity to escape, proposed to receive him into their custody, and to redeliver him to the said Westcott at a day and place mentioned, so that he might be conveyed to prison; that in consideration of this engagement, the said Stoyel, was confided to their custody; but that, instead of being redelivered, the said Stoyel and Carder combined to permit the said Stoyel to escape and depart out of the said State; "and the said Stoyel, with the consent, connivance, and assistance of the said Carder, did escape and depart into the State of Rhode Island, to the great damage of the said Westcott."

The defendants (below) went to trial on the plea of not guilty; verdict was rendered against them; and, on motion in arrest for the insufficiency of the declaration, the same was adjudged sufficient.

1. It is now objected, that the declaration was insufficient, inasmuch as *tort* and *assumpsit* were therein joined.

If this were the fact, the judgment of the Superior Court unquestionably would be erroneous. *Assumpsit* and *tort* may not be joined in one declaration, because they do not admit of the same plea and judgment. But, on inspecting the record, it plainly appears, that the action is wholly founded in tort. The contract is disclosed merely by way of inducement; and *the gist* of the action is the *misfeasance*. The plaintiff has alleged his *gravamen*, as consisting in a breach of duty, arising out of a fraudulent combination to procure the escape of Stoyel, and in his subsequent escape by the assistance of the defendants.

That the action might have been legally founded on contract, is no criterion in this case. It is sufficient to say, that the plaintiff, who had it in his option to commence such an action as he considered best adapted to the nature of the injury, has elected to lay the *res gesta* in tort. * * *

* * * * *

GUINNIP v. CARTER.

Supreme Court of Illinois. 1871. ✓*58 Illinois, 296.*

• • • The first three counts were in debt in the usual form, and the fourth was the common count in *assumpsit* for interest. Defendant filed a demurrer to the declaration, but afterwards, on plaintiff's motion, the demurrer was stricken from the files, and judgment rendered in favor of plaintiffs for \$1,171 debt and \$28 damages, and costs; to reverse which, defendant prosecutes this writ of error.

WALKER, J., delivered the opinion of the court.

This was an action brought on the record of a judgment recovered in another State, for the sum of \$1,171, and \$4.95 costs. The summons was in debt, and so were the three first counts in the declaration. The fourth count was, however, in *assumpsit*. It was the common count for \$500 due and owing for interest. It avers: "And being so indebted the said Guinnip, in consideration thereof, afterwards, etc., undertook and then and there faithfully promised the said plaintiffs" to pay the same when thereunto afterward requested.

In the cases of *Cruikshank v. Brown*, 5 Gilm. 75, and *McGinnity v. Laguerenne*, ib. 101, it was held, that in a common count the averment that the defendant, in consideration of the indebtedness, undertook and promised to pay, when thereunto afterwards requested, made it a count in *assumpsit*. It was there said that, "had the pleader intended it for a count in debt he should have used the word 'agreed' instead of the word 'promised.'" In those cases the judgments were reversed, because there was a misjoinder of counts in debt and *assumpsit*.

In the case of *Adams v. Hardin*, 19 Ill. 273, it was held to be error to join counts in debt and *assumpsit*, and the judgment was reversed for that reason. This is a rule of general application, and has always been held to be error under the common law rules of pleading. The case at bar falls within and must be governed by the cases above cited. In this case there were in the declaration three counts in debt and one in *assumpsit*. This was a clear misjoinder

of counts, and for that reason the judgment must be reversed and the cause remanded, with leave to amend.

*Judgment reversed.*²¹

21. "The practical difficulty is, that the defendant does not know how to plead. If we recognize the forms of actions, the defendant cannot plead *non assumpsit* in an action of debt, and *nil debit* is, in the nature of things, no answer to a claim for unliquidated damages."—*American Linen Thread Co. v. Sheldon* (1866) 31 N. J. L. 420, 421.

Take

ARNOLD v. MAUDLIN.

✓

Supreme Court of Indiana. 1842.

6 Blackford, 187.

BLACKFORD, J.: This was an action of trespass. Three counts; the first of which is for breaking the close; the second and third for an assault and battery. General demurrer to the declaration, and judgment for the defendants.

The only objection made to the declaration is, that there is a misjoinder of counts. This objection is without foundation. Several trespasses, as assault and battery, false imprisonment, and trespasses upon property either real or personal, may all be joined. Gould on Plead. 212.

PER CURIAM. The judgment is reversed with costs. Cause remanded, etc.

Take

TREGENT v. MAYBEE.

✓

Supreme Court of Michigan. 1884.

54 Michigan, 226.

SHERWOOD, J.: * * *

The defendants asked the court to require the plaintiff's counsel to elect as to which of the counts he would rely upon for a recovery in the case. The plaintiff had joined with his special count the common counts; the special count charging the fraudulent obtaining of the moneys sued for, and waiving the tort. The plaintiff claimed there was a misjoinder of counts. The court refused to compel the

election, and this is alleged as error. We think the ruling of the court was right. Under our statute and practice *assumpsit* in cases of this kind may be brought, and any other causes maintainable in the same form of action may be joined with it in the same suit.

It is no ground of objection that the facts constituting the wrong are stated in the count wherein the tort is waived; they must be proved to entitle the plaintiff to recover and therefore must be stated in the declaration. The defendant is deprived of no right by the joinders complained of. He is permitted to make any defense to the count based on the tort that he might had the common counts not been added, and there is no reason why plaintiff should not join all the causes he has, when recovery may be had in each in the same form of action if separate suits were brought. Under the declaration in this case the plaintiff was entitled to recover under either count if he could make his proofs.²²

* * * * *

22. This simple test of identity in the form of action is perhaps the most universally applicable.

COLE v. LIPPITT.

Supreme Court of Rhode Island. 1900, 1903.

22 Rhode Island, 31; 25 Rhode Island, 104.

Trespass on the case for negligence. The facts are sufficiently stated in the opinion. Heard on demurrer of defendants to declaration. Demurrer sustained to second count.

STINESS, J.: The plaintiff brings this action against the owner, builders, and supervising architect of a house for negligence in its construction, whereby the decedent lost his life. The declaration has two counts, and the defendants severally demur upon the ground that they are improperly joined as defendants in the same action, because the declaration sets out several and distinct, and not joint, breaches of duty and causes of action.

The first count sets out a joint and common undertaking to build the house, and a joint and common hiring of the

decendent, Pierce. It is not, therefore, objectionable on the ground set forth in the demurrer.

The second count sets out the contractual relations existing between the defendants, the different parts which each of them took in the work of construction, the consequent duty to the workman, the breach thereof by the several parties defendant, and the resulting death of Pierce. Without reciting the long count, it shows that Lippett was the owner of the estate, who made a contract with Maguire and Penniman for a part of the construction of the house, and employed Robertson to supervise the work, and that Pierce was employed by Maguire and Penniman; that in the course of the work a part of a tower fell upon Pierce and killed him.

The negligence charged against Lippitt is that he caused the erection of the house upon improper plans, which provided for a tower with an overhanging battlement without proper support, and also provided for bricks and mortar of a kind too hard to form a strong bond, etc.

The negligence charged against Robertson is that he caused the erection of the house under improper plans, and the negligence charged against Maguire and Penniman is that they did not use reasonable care in construction, and failed to counterbalance and anchor the walls; also, that they built the battlement in too short a time for the mortar to set and harden.

These several charges of negligence are quite different in kind and relation, but the plaintiff claims that they constitute a joint liability, because the negligence of each defendant combined with others to produce the injury. This, however, is not enough to make a joint tort. As stated in *Bennett v. Fifield*, 13 R. I. 139, parties cannot be declared against jointly where there is no community of wrongdoing, even though the tort of one might be such that, without it, the neglect of duty charged upon the other would not have followed. A similar statement is made in *Sellick v. Hall*, 47 Conn. 260, 274, that it is not enough to make torts joint that the acts constituting them stand in juxtaposition in time and place. "There must be a oneness of act." The fact that the effects of several wrongful acts are produced at the same time and place cannot affect the question. In *Doremus v. Root*, 94 Fed. Rep. 760, it was held that although a master and his servant through whose negligence another is injured may each be liable for such

injury, their obligations rest upon different grounds, and they cannot be held jointly liable.

The second count of this declaration before us clearly states "three different cases, against three different defendants, for three different causes of action." Lippitt is charged with furnishing improper plans; Robertson with improper supervision; and Maguire and Penniman with improper work. These three grounds of liability are quite distinct. There is no common legal relation between them with respect to the plaintiff. Of course it may be said that if there had not been improper plans or improper supervision or improper work, there would have been no injury; but that does not make the three things a joint act. Evidently Maguire and Penniman had nothing to do with procuring the plans, nor Lippitt with the doing of their work. A resulting liability on the part of the owner, arising from a right of supervision of the work, does not make an act of the builders his act. Both may be liable and yet not jointly liable, because the cause of action against each is different from the other. Between Pierce and the builders there was a contractual relation of master and servant, but none between him and the owner, unless the builders are treated as his agents, and none whatever between Pierce and Robertson. We think, therefore, that the count is clearly bad.

* * * * *

The demurrers to the second count are sustained.

PER CURIAM. When this case was last before the court, in 23 R. I. 542, we said: "The declaration charges a joint invitation. Such an invitation must be proved in order to recover against the defendants jointly." But the record shows that the evidence offered at the trial tended to establish not a joint liability of the defendants, but rather, as was said by the court when the case was before us in 22 R. I. 31: "Three different cases against three different defendants for three different causes of action." The case is therefore one of misjoinder of causes of action rather than one of misjoinder of defendants in the same cause of action, since neither is the tort of each defendant the same, nor is the negligence or the liability of each defendant the same.²³ * * *

23. It is equally fatal to the right to join different causes of action that the parties plaintiff are not the same in all of them.—*Yeager v. Town of Fairmount* (1897) 43 W. Va. 259; *Miller v. Butler* (1904) 121 Ga. 758.

*Take***HANCOCK v. HAYWOOD.** ✓*Court of King's Bench. 1789.**3 Term Reports, 433.*

The plaintiffs in their original writ described themselves as assignees of the estate and effects of Lomas, and also as assignees of Edensor; there being no joint commission against the two; and declared for goods sold and delivered by both the bankrupts; and also for goods sold by each of the bankrupts, and for money paid, and money had and received by the defendant to the use of each of the bankrupts; and also for money had and received to the use of the assignees, on separate counts. A verdict was found for the plaintiffs, not in a gross sum, but the damages were assessed and apportioned to the demands proved on the several counts respectively. And a rule having been obtained to shew cause why the judgment should not be arrested,

Erskine, Law, and S. H. Heywood, now shewed cause, observing that this was not like the case of an executor being sued for one debt due from the testator, and for another from himself, where the judgment in one case is *de bonis testatoris* and in the other *de bonis propriis*: in that case the party is not sued in the same right. But here the plaintiffs are the representatives of each of the bankrupts, and do not sue in different rights. The effects of both the bankrupts are centered in one set of persons, and they, in that one, and the same, character may sue for debts due to either; in the same manner as a surviving partner may sue for a partnership debt, and a debt due to himself alone, in the same action. * * * One test of judging whether separate causes of action may or may not be joined, is to consider whether the same plea may be pleaded to, and the same judgment given on them: now here the pleas and the judgment are the same. At all events the court will not arrest the judgment *in toto*; for as the damages are assessed on the several counts, the judgment on some counts only may be arrested.

Bearcroft and Russel, contra. This is an action in two different rights, though brought by the same persons, between whom there is no privity as to the separate demands.

It is clear that the bankrupts themselves could not have joined in bringing one action for their separate debts; then their representatives cannot do what the represented could not have done; and the commissions of bankrupt vest no greater privileges in them than the bankrupts enjoyed.
 * * * Neither is the judgment the same: for it must be that the plaintiffs as assignees of one of the bankrupts shall recover on one set of counts, and on another set as assignees of the other bankrupt: they must therefore be different judgments, so that this will not stand the test of the rule mentioned by the counsel for the plaintiffs. * * *

This has no resemblance to the case of a surviving partner joining debts due to himself in his own character, and as survivor, because there he must be plaintiff in both actions, if he brought two; whereas in this case it was not necessary that the plaintiffs as assignees of one bankrupt should sue for a debt due to the other. This falls within the rule which doth not allow a person to sue in his own right, and in *auter droit*, in the same action; and the plaintiffs here were obliged to sue as assignees for part of the demand; the first set of counts being for goods sold by both the bankrupts.

The court said they would consider the point; and

LORD KENYON, Ch. J., on the next day said, they had looked into the cases, and were clearly of opinion that the different rights could not be joined in the same action. But that the plaintiffs might enter up their judgment on those counts for the joint debts due to both bankrupts.²⁴

* * * * *

24. *Joinder of actions in case of death by wrongful act.* Where two actions are maintainable by the administrator of the deceased, one based on the statute providing for the survival of the deceased's cause of action and the other on Lord Campbell's Act, they cannot be joined. In *Brennan v. Standard Oil Co.* (1905) 187 Mass. 376, the court said: "The first count is founded upon an alleged statutory liability for causing the death of the plaintiff's intestate, which the plaintiff seeks to enforce as the representative of the next of kin, for whom he would hold the proceeds. The second count is upon the liability at common law, for injuries to the intestate, for which he had a right of action during his life, and the claim is made by the plaintiff as legal representative of the estate of the deceased, for which he would hold the proceeds. In the first the plaintiff acts only as trustee for the next of kin, in the second only as trustee for those interested in the estate. These claims do not accrue to him in the same capacity; and hence by the rules of common law pleading, which in this respect have not been changed by our statutes, they cannot be joined in the same action. Gould, Pl. c. 4, § 93, and cases cited."

false

LASHLEE v. WILY. ✓

*Supreme Court of Tennessee. 1843.**8 Humphreys, 658.*

TURLEY, J., delivered the opinion of the court.

This is an action of trover brought by the plaintiff, as administrator de bonis non, against the defendant, for the wrongful conversion of a negro girl slave named Caroline. The declaration contains two counts. The first charges that the plaintiff was in possession of the negro girl, as of his own property; the second, that he was in possession of her as administrator. Both counts aver a loss of possession and a conversion by the defendant.

* * * * *

In the first count he may charge that he was in possession in his own right; and in the second, that he was in possession in his right as bailee of the true owner; and it would be no misjoinder; for, as has been observed, the wrong done is to the possession and not to the title; and the action brought is not upon two distinct separate demands, the one in plaintiff's own right and the other *in auter droit*; for though, in the second count, he claims the property as bailee, yet it is not an action in right of the bailor, but in right of the bailee. So it is when a man is in possession of personal property as executor or administrator, and a wrong has been done to that possession by a conversion of it, and he brings an action of trover for that conversion, he may charge in his declaration that he was in possession of the property, either in his own right or in his right as executor or administrator, the one being a general and the other a special right, and for safety he may charge it both ways, and it is no misjoinder; for in either way it is an action upon a demand in his own right, and not in the right of another, for inasmuch as it is in either case his own possession which has been invaded, and as it is this which gives the cause of action, it must of necessity be upon a demand in his own right, and not in that of another. In what other can it be? Surely not that of his testator or intestate, for no wrong has been done to their property. By 4th and 25th of Edward III, an executor or administrator may have trover for the goods of the deceased taken in his lifetime.

Now, if one of the counts in this declaration had been under these statutes for a conversion in the lifetime of plaintiff's intestate, and the other for a conversion of his own property, then would there have been clearly a misjoinder, because there would have been a demand in his own right, joined with a demand *in autre droit*, to-wit, that of intestate. And this is what is meant, and nothing more, when it is said in the books that an executor or administrator cannot include counts on causes of action accruing to him in his private right and individual character, with counts on causes of action which are laid to have been vested in him in his representative character, viz., causes of action which accrued to the testator or intestate and are sued upon by their executor or administrator, as his personal representative. An executor or administrator, therefore, cannot in the same action sue upon contracts made with his testator or intestate in his lifetime, and which have survived to him as his personal representative, and contracts made with himself in his individual capacity, because they are demands in different rights. So neither can he unite in one action demands for the conversion of the property of his testator or intestate in his lifetime, and for which a right of action survives to him under the 4th and 25th of Edward III., with demands for the conversion of his own property. To this extent the authorities are abundant, but there is not one that goes further. We are of opinion, then, that the circuit judge was mistaken in supposing that the two causes of action, as set forth in the declaration in this case, are for demands accruing in different rights, and that he therefore erred in refusing to give judgment in favor of the plaintiff upon the verdict, and in arresting the same. And we now, proceeding to correct this error, do direct a judgment here in favor of the plaintiff for his damages assessed, and costs.

Both demands in P's own right.

CECIL v. BRIGGES.

Court of King's Bench. 1788.

2 Term Reports, 639.

Manly obtained a rule to shew cause why these two actions should not be consolidated, because they were both in

assumpsit; the cause of action arose in the same county; the writs in both actions were sued out on the same day; and the defendant had been held to bail in both. The rule likewise called on the plaintiff to shew cause why he should not pay the costs of this application.

Lane now shewed cause, insisting that it was not necessary that the plaintiff should in all cases consolidate his several causes of action, though they were of the same nature, and accrued at the the same time; for although his witnesses to prove one contract might be able to attend the first assizes yet perhaps a material witness to prove the second cause of action might be absent. Such an application was never made before; and the court will not readily grant the present, inasmuch as it will unnecessarily throw a difficulty in the plaintiff's way of pursuing his right of action. At all events, however, the latter part of the rule, respecting the costs, must be discharged. But

The court said, that, as by the rules of law the plaintiff might have comprised both his causes of action in the same declaration, it was oppressive to sue out two writs at the same time. That the possibility of this rule being attended with any inconvenience to the plaintiff was no answer to this application; because if any special reason why these two actions should not be consolidated had existed, the plaintiff ought to have shewn it. And no inconvenience would arise, even if the fact were as the plaintiff's counsel suggested, namely, that all his witnesses might not be ready at the assizes, because he might apply to put off the trial on that ground. And as they were of opinion that it was an oppressive kind of proceeding, they made the rule absolute with costs.

SECTION 7. BILLS OF PARTICULARS.

AMERICAN ROLLING MILL CORPORATION v. OHIO IRON AND METAL COMPANY.

Appellate Court of Illinois, First District. 1905.

120 Illinois Appellate, 614.

STATEMENT BY THE COURT. Appellant brought an action for slander against appellees. The declaration as amended contained ten counts.

March 16, 1904, an order was entered upon appellant to file within twenty days a bill of particulars of places at which, and names of persons to whom, each of said slanderous remarks were uttered, and names of individuals, firms or corporations which otherwise would have dealt with the appellant but for the use of said slanderous words; the filing of said bill to be without prejudice to appellant's right to amend it so as to set up matters coming to the knowledge of appellant between the date of filing said bill and the trial of said cause, provided the amendment be upon reasonable notice. To the entry of this order appellant duly objected and excepted.

April 8, 1904, said suit was dismissed at appellant's costs and judgment thereon for failure of appellant to comply with the foregoing order. This appeal followed.

BALL, P. J., delivered the opinion of the court.

The several counts of the declaration charge that the alleged defamatory words were spoken "November 25, 1902, in said county * * * in the presence and hearing of another, or divers persons, * * * and divers persons, who had, previous to the speaking and publishing of said words, been accustomed to deal, and others who would otherwise have dealt with plaintiff in its business, have since then, and wholly on that account, refused to have any dealings with plaintiff," to the damage of plaintiff in the sum of \$100,000.

It is plain that to whom and at what place the alleged slanderous words were used are not set forth in the declaration, nor is any attempt made therein to state the name of any individual, firm or corporation that would have dealt with appellant had such words not been spoken.

A bill of particulars may be demanded in all actions where, by reason of the generality of the claim or charge, the adverse party is unable to know with reasonable certainty what he is required to meet. *C. & N. W. Ry. Co. v. C. & E. Ry. Co.*, 112 Ill. 589, 604; *Stiebeling v. Lockhaus*, 21 Hun, 457. When required and furnished its effect is to limit the plaintiff on the trial to proof of the particular cause or causes therein mentioned. *Morton v. McClure*, 22 Ill. 257; *Waidner v. Pauly*, 141 Ill. 442; *Hess Co. v. Dawson*, 149 Ill. 145. Whether or not the plaintiff shall be ruled to furnish a bill of particulars in a given case, is a matter resting in the sound legal discretion of the court, and the action

of the court in making or refusing the rule will not be reviewed in appellate jurisdictions unless it be shown clearly that such discretion was abused. *C. & A. Ry. Co. v. Smith*, 10 Ill. App. 359, 362; *DuBois v. People*, 200 Ill. 164.

Where the allegation of the declaration in an action for slander are not specific enough fully to apprise the defendant of the cause of action in its statement of the actual words uttered, or to whom or in whose presence, or the place where uttered, the court may, and, upon proper application, should order the filing of a bill of particulars, so that the defendant may have a fair chance to prepare for the trial.

It is almost necessary, of course, in an action of slander, unless the plaintiff alleges the place where, the time when, and the names of the persons to whom the slander was uttered, to order a bill of particulars of the place where, the time when, and the names of the persons to whom the slander was uttered. *Townsend on L. & S.* (4th Ed.) 490.

In *Gardinier v. Knox*, 27 Hun, 500, the date the words were spoken was given, and it was alleged that they were spoken at the town of Russell "in the presence of divers good and worthy citizens." Upon motion the court ordered a bill of particulars, saying: "The complaint gives little information, for under it proof need not be confined to the day stated; it might be given as to any place in the town of Russell and as to any persons shown to be present. If the defendant knew the times and place where the occurrence would be shown, he could obtain proof of his own whereabouts."

In *Tilton v. Beecher*, 59 N. Y. 176, an action of *crim. con.*, the trial court denied an application for a bill of particulars solely upon the ground that it had no power to grant it. The court of appeals decided that the trial court possessed the power, and for that reason reversed and remanded the case. After an extended review of the authorities in England and in the United States, the court laid down the following rule: "A bill of particulars is appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put for trial with greater particularity than is required by the rules of pleading." See, also, *Com. v. Snelling*, 15 Pick. 321; *Jones v. Platt*, 60 How. Pr. 277; *Davies v. Chapman*, 6 Ad. & E. 767; *Stiebling v. Lockhaus*, 21 Hun, 457; *Rex v. Hodgson*, 3 Carr & Payne,

422; *N. Y. Infant Asylum v. Roosevelt*, 35 Hun, 501.

The trial court did not err in ordering appellant to file a bill of particulars in this case. Appellant saw fit to disobey that order. Such disobedience fully justified the action of the court in dismissing the suit.

The judgment of the circuit court is affirmed.

*Affirmed.*²⁵

25. *Late origin.* Chief Justice GIBBS, writing the opinion of the Court of Common Pleas in *Lovelock v. Cheveley*, 1 Holt, 552, in the year 1817, said that "the demanding and granting of particulars is almost a new system within the recollection of many of us."

The plaintiff is entitled in appropriate cases to particulars of a set-off (*Mercer v. Sayre* (1808) 3 Johns. (N. Y.) 248) and even of affirmative defenses (see many New York cases cited in 3 Encyc. Pl. & Pr. 525), but not of matters to be shown under a traverse. (3 Encyc. Pl. & Pr. 526-527.)

Application should ordinarily be made before pleading to the merits. (*Amer, Hyde & Co. v. Chalkley* (1903) 101 Va. 458), and when made later will be looked upon with suspicion as intended for delay (*Andrews v. Cleveland* (1830) 3 Wend. (N. Y.) 437).

"*Affidavits* may sometimes be necessary to show that the party applying for particulars is ignorant of the particular ground of action or defense intended to be covered by the statement of claim or defense; but, if it appears upon the face of the pleadings that there is nothing to indicate the real ground of complaint or defense. I fail to see the necessity of an affidavit at all."—MCDONALD, J., in *Ashton v. Nova Scotia Cotton Mfg. Co.* (1890) 22 Nova Scotia, 311.

VILA v. WESTON.

Supreme Court of Errors of Connecticut. 1865.

33 Connecticut, 42.

Assumpsit, against the defendant as surviving partner of the firm of Imlay & Weston. The declaration contained a special count upon a promissory note of the firm, and the common counts in general *assumpsit*, * * *

The plaintiff previous to the trial filed the following bill of particulars:

Boston, August 10, 1857.

Messrs. Imlay & Weston, Hartford, Conn.

Bought of Joseph Vila.

Six barrels tallow oil, 248 galls. at \$1.....\$248.00

Carting 1.26

\$249.26

The case was tried, on the general issue closed to the court, before CARPENTER, J. On the trial the plaintiff offered in evidence under the common counts the note of Imlay & Weston. The defendant objected to its admission on the ground that it was not stated in the bill of particulars, but the court admitted it.

* * * * *

* * * The defendant moved for a new trial.

Chamberlin, in support of the motion.

1. The note should not have been admitted under the common counts. It was inadmissible under the special count by reason of variance, and was excluded under the common counts by the bill of particulars, which stated the plaintiff's whole claim under those counts and made no reference to the note. A bill of particulars limits a plaintiff to the particular matters set forth in it. * * * It will not do to say that the description of the note in the special count is sufficient notice to the defendant, since it was rejected as proof under that count on the ground of variance. It therefore cannot be regarded as described in that count.

* * * * *

Goodman and Freeman, contra.

1. The note was admissible in evidence under the common counts. The whole object of the bill of particulars was to give the defendant notice in an informal way of the claim that he would have to meet. *Landon v. Sage*, 11 Conn. 306. Where this appears from the declaration no bill of particulars is necessary. Here the note is set out in the special count with sufficient accuracy to give the defendant notice of it, and it was not necessary that further notice should be given of it by the bill of particulars. The defendant cannot claim to have been taken by surprise.

* * * * *

BUTLER, J.: A bill of particulars is demandable by the defendant of right, where there are general counts. It may be asked for in respect to one or all the counts. If required and ordered for all the counts, it limits the right of the plaintiff to give evidence in respect to all. If not required at all, the defendant waives, or rather does not exercise his right, and if required in respect to one or a part of the counts, the right is waived as to the others. So the plaintiff may voluntarily give a bill of particulars in respect to one or all the counts, and he will be concluded to the same ex-

tent as if the bill was demanded and ordered, and furnished in compliance with the order, for it is in effect an amendment of his declaration. It is not unusual for a plaintiff to give, or for the defendants to ask, a bill in respect to the counts for goods sold, or work and labor done, without reference to the money counts, and in such case the bill is not operative as to them. In this case it does not appear whether the bill was furnished voluntarily, or on request, or in compliance with an order of the court; nor does it appear whether it was asked for or given with reference to all the counts or not. On its face it is applicable to the count for goods sold, and that only, and there is no presumption that it was asked for, ordered or intended for any other. The court must be presumed to have acted rightly, and the onus of showing the contrary is upon the defendant, and as the motion does not show that the bill furnished was intended for the money counts and was operative in respect to them, the first point of the defendant could not avail him if right in respect to the principles involved.

But the defendant is wrong in respect to those principles. Such a bill is doubtless in a general sense an amplification of the general count and has the effect to make it, *quoad* the consideration of the alleged promise, a special one, but its only purpose is to apprise the defendant of the nature of that consideration and demand. It need not be technically accurate; it cannot be demurred to; it is sufficient if it gives the necessary information to the defendant, and if he thinks it does not he must move to have it made more specific, or abide it. As the sole office of the bill is to give the party information which the pleadings by reason of their generality do not give, he cannot require the bill where the necessary information is contained in a single count. It is not necessary, therefore, that the plaintiff should insert in his bill a note which is declared upon specially, or state in the bill that he shall offer it under the money counts if it becomes necessary. The defendant is informed by the special count that the plaintiff claims to recover in *that action* on *that note*, and he knows, as *matter of law*, that if the plaintiff has misdescribed it, and it is objected to on the ground of variance, he will have a right to offer it, and probably will offer it, under the money counts; and these are all the material facts that he could learn from the most carefully prepared bill of particulars.

These principles have been recognized in our sister states, although the cases seem to have been overlooked. Thus, in *Tibbetts v. Pickering*, 5 Cush. 83, a note was declared upon specially, and the money counts were added. A rule of the court prescribed that the plaintiff in all cases where there were general counts in the declaration should file a bill of particulars, and should not be permitted to give evidence applicable to them unless he did so. None was filed in the case. On the trial the note declared upon was offered under the special count, and objected to on the ground of variance. The court admitted it, and the question whether it was properly admitted or not was carried to the supreme court. That court did not decide that question, but held that it was unnecessary to do so, for that, if inadmissible a new trial could not be granted because the note was admissible under the money counts notwithstanding there was no bill of particulars. In respect to that question the court said: "The defendant had full knowledge of this claim of the plaintiff from the pleadings. The note itself now sought to be recovered was set forth as a cause of action in one of the counts. This superseded the necessity of filing a bill of particulars, setting forth the note as a demand upon which the plaintiff would rely at the trial."

So in the *People v. Munroe*, 4 Wend. 200, a note was declared upon specifically, and offered, objected to, and received under the money counts, although there as here there was a bill of particulars which did not specify it. The case went up to the supreme court on that ruling, and they sustained it. SAVAGE, Ch. J., in giving the opinion of the court, said: "The note was properly received in evidence, although not specified in the bill of particulars. The use of a bill of particulars is to apprise a party of the specific demands of his adversary, when the pleadings are general, and leave uncertain what is particularly demanded, either in a declaration or notice of set-off, and has no application whatever when the demand is specifically set forth in the pleadings." These principles and cases are decisive on the point.

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CICOTTE v. COUNTY OF WAYNE.*Supreme Court of Michigan. 1880.**44 Michigan, 173.*

GRAVES, J.: This record is remarkable. It shows that the plaintiff sued the county by declaration on the common counts, and it contains a bill of particulars furnished by the plaintiff, a plea of the general issue, a demurrer to the declaration but no joinder, a stipulation to put the case on the "jury docket" for the May term of 1878, and a final judgment on the demurrer against the plaintiff in August of that year. The date of the plea does not appear, and whether it preceded or followed the demurrer is therefore not explained. In case it was put in before the demurrer, the demurrer was not regular. The plea to the merits should have been withdrawn. If it was put in afterwards the effect was to waive or supersede the demurrer. There cannot be an issue of fact and one of law on the same record at the same time in respect to the same matter. They are incompatible. One admits what the other denies. In the order of the pleading the defense by demurrer is required to be taken before going to issue upon the fact, and in case a plea has been made and it appears desirable to demur to the same count or counts the plea should be withdrawn from the record. So long as it stands it excludes the right to demur. If the plea is put in subsequent to the demurrer, it overrules it. These are familiar rules, and the record contains no explanation in terms to rescue the case from their operation.

But let it be assumed that the demurrer was in the record to be adjudicated. The claim is made that the bill of particulars became incorporated in the declaration, and that it hence appeared that the cause of action was not suable against the county, and this seems to have been the theory on which the court below proceeded in allowing the demurrer. Of course this view is wholly inadmissible. The object of the practice for the production of bills of particulars, is to obviate the uncertainty of general pleading. The intent is to secure such information as will enable the parties to make an intelligent preparation for trial, and to

enter upon the investigation before the court or jury with an understanding as to what is really in controversy. The bill is often mentioned as being an amplification of the declaration or as entitled to be considered as a part of the pleading. But such expressions are metaphorical. The bill is never in strictness a component of the pleading. It may have the effect of a pleading in so far as it restricts the proof to what it contains. To consider it as pleading would be a circuitous return to the practice of special pleading within certain limits; and this would contradict one of the necessary implications of the introduction of bills of particulars. The remedy by the method of general pleading was to be improved without impairing its convenience and without bringing in the technicalities and refinements of pleading. No one has ever supposed the service of a bill of particulars constituted an actual amendment of the pleadings, or that an amendment of the bill operated as a change of the issue on the record. And a plea or demurrer to a bill of particulars would be an anomaly. The declaration in the record was no more subject to demurrer after the bill of particulars than it was before. It continued to be the usual declaration on the common counts, and whatever question there was or might be in regard to the right to sue the county for matters described in the bill of particulars, would have to be raised in some other way. It would naturally arise at the trial. It was not impossible that the bill might be entirely changed so as to obviate all objection.

The result is that the only point the demurrer could raise was the abstract right to bring a suit by declaration on the common counts against the county, and in regard to that there is no room for discussion. The right is plain. *Endriss v. Chippewa County*, 43 Mich. 317.

The judgment must be reversed with costs and the case be allowed to proceed according to law.²⁶

26. Technical exactness in the bill of particulars is not to be insisted upon, and the variance between the particulars furnished and the evidence offered must actually tend to mislead in order that advantage may be taken of it. In *Tillow v. Hutchinson* (1835) 15 N. J. L. 180, the court said:—“In *McNair v. Gilbert*, 3 Wend. R. 344, the notes were described in the particular, as being on interest, when they were not so. The objection was overruled; and the court say, ‘the true rule on the subject, seems to be, that variances are immaterial, unless they are calculated to mislead.’ In *Day v. Bower*, 1 Camp. N. P. 69, in note, a mistake had been made in the particular, by charging 83 l. 13 s. 6d, with the usual mercantile abbreviation of *ditto*, *ditto*, under a wrong name; thus reading as if the payment had

been made to the person last named, instead of the person named in the next preceding line but one. Lord ELLENBOROUGH, refused to exclude the evidence of that payment, unless the defendant would make affidavit that he had been misled by the particular. In *Davis v. Edwards* 3 M. and S. 380, in debt for rent; the premises were in A, but were described as in B; but it was considered immaterial, unless the defendant would show he held other premises of the plaintiff in B. In *Temmy v. Gibbs*, 3 Bing. R. 3, which was ejectment for non-payment of rent, a variance between the rent proved, and the amount stated in the particular, was disregarded. In *Millwood v. Walter*, 2 Taunt. 224, the work was charged in the particular, as done in August, instead of May. MANSFIELD, Chief Justice, said, 'the bill of particulars must not be made the instrument of that injustice, which, it is intended to prevent. If there had been *two* demands; one for work done in May, and another in August, there might have been some ground for the objection.'—and in case referred to, in Manning's Index, 240, the particular specified a bill of a certain day for 60 l., but the evidence was of a bill for 63 l., of a *different day*, but the *same year and month*; and ABBOTT, Justice, held the variance immaterial. See other cases cited in 2 Saund. pl. and evid. 246. I do not say, that we ought to go the length of all these cases; but I think we may extract from them, this reasonable rule; that if the particular is not calculated to mislead, it shall be deemed sufficient, unless upon affidavit or other satisfactory evidence of surprise, by the adverse party.'

DIBBLE v. KEMPSHALL.

Supreme Court of New York. 1841.

2 Hill, 124.

Declaration, money counts in *assumpsit*, annexing copies of two promissory notes, which the plaintiff gave notice would be given in evidence on the trial. Plea in bar that the defendants had procured a bill of the particulars of the plaintiff's demand, pursuant to the rules and practice of the court, and, after setting out the bill of particulars, which contained copies of the two promissory notes, alleging matter of defence to the two notes. Demurrer and joinder.

O. Hastings, for the plaintiff, said the plea was bad. It should have been pleaded to the count or declaration—not to the notes. (Anon. 19 Wend. 226, and note.)

THE COURT. The plea is bad, for the reason assigned by the counsel.

A. Sampson, for the defendants, took a distinction between this case and the one cited. Here there is a *bill of particulars* of the plaintiff's demand, which is an amplification of the declaration, and therefore the defendants may plead to the notes.

THE COURT. The bill of particulars makes no difference. We decided the same point in a case argued by Mr. Stevens. The defendant can only plead to the note where the plaintiff counts upon it.

Judgment for the plaintiff.

BUCKNER v. MEREDITH.

Court of Common Pleas of Philadelphia. 1867.

1 Brewster, 306.

On the trial, before BREWSTER, J., *Edward McCabe, Esq.*, for plaintiff, offered in evidence a book of original entries. The first entry read thus: "Balance from former account."

John S. Powell, Esq., for defendant, objected. The entry was ruled out.

The plaintiff then offered to give in evidence the items composing this balance.

Mr. Powell objected that the bill of particulars did not give those items in detail, but stated them thus: "Balance from former account."

The objection was overruled, because the defendant could have refused to plead, and have demanded a more specific bill.

CHAPTER V.

PRINCIPLES RELATING TO PLEAS IN GENERAL.

SECTION I. NECESSITY FOR PLEA.

RUFFNER v. HILL.

Supreme Court of Appeals of West Virginia. 1882.

21 West Virginia, 152.

[This is an action of ejectment. An order was made docketing it for trial, and a jury was empaneled to try the issues joined, who found a verdict for the plaintiff. The defendants took the case up on error, and it appeared that the record failed to show that any plea had been filed, though private, unofficial memoranda of the judge and clerk indicated that a plea of not guilty had been entered.] ²⁷

GREEN, J., announced the opinion of the court:

* * * * *

In the case before us, the private memorandum of a judge no longer in office, and the docket of a clerk no longer a clerk, would have to be resorted to to make an order of the filing of a plea in this case *nunc pro tunc*. This clearly cannot be done. We must therefore consider, that in the trying of this ejectment case, no plea was filed in the circuit, court, and of course no issue was joined, and yet a jury was empaneled and sworn to try the issue joined, and they found a verdict for the plaintiff for the land in the declaration mentioned, and that he was entitled to this land in fee simple. On this verdict so procured, the court rendered on December 20, 1875, a judgment, that the plaintiff recover of the defendants the possession of the premises described in this verdict and his costs, and writ of possession was awarded him.

This is the judgment to which a writ of error has been granted; and it is clear, that it must be reversed without any regard to the merits of the case as set out in their bill of exceptions, for it is very well settled, that in no case

27. Condensed statement of facts by the editor.

either civil or criminal, can the court direct the empaneling of a jury and the trial of a case when no issue has been made up; and if this be done, as it was done in this case according to the record, the court below could not properly enter up any judgment on this verdict of the jury so rendered.

The cases are numerous both in Virginia and in this State, where verdicts and judgments have been set aside by the appellate court, only because the verdict was rendered when no issue had been joined. See *Stevens v. Taliaferro*, 1 Wash. 155; *Taylor v. Houston*, 2 H. & M. 161; *Kerr v. Dixon*, 2 Call, 379; *Williamson's Adm'r v. Bennett*, 3 Munf. 316; *Sydnor v. Burke*, 4 Rand. 161; *McMillion v. Dobbins*, 9 Leigh, 422; *Rowans v. Givens*, 10 Gratt. 250; *B. & O. Railroad Co. v. Gettle*, 3 W. Va. 376; *B. & O. Railroad Co. v. Christie*, 5 W. Ba. 325; *Gallatin's Heirs v. Haywood's Heirs*, 4 W. Va. 1; *B. & O. Railroad Co. v. Faulkner*, 4 W. Va. 180; *State v. Conkle alias Swank*, 16 W. Va. 736; *State v. Douglas*, 20 W. Va. 770.

These decisions were rendered in a great variety of cases. In actions of debt, detinue, trespass on the case and *assumpsit*, and in writs of right and indictments for felonies. None of these however happen to be actions of ejectment; and it is now claimed by counsel for the defendants in error, that though in all other cases, either criminal or civil, the judgment of a court based on the verdict of a jury professedly on the issue joined, where in fact no issue appears by the record to have been joined, must be reversed by the appellate court, yet such a judgment ought not to be reversed in an ejectment cause; because by the law, Code of W. Va., ch. 90, sec. 13, p. 519, no other plea can be filed in an ejectment case except the plea of "not guilty;" and therefore it must be conclusively presumed that the jury were really sworn to try the issue on the plea of not guilty, though no plea was put in.

It is said, the only issue which could be made up, is the one actually tried, and it would be too technical to reverse, because the formality of entering the plea of not guilty was omitted. But these cases abundantly show, that the court has not reversed judgments entered upon such verdicts, because there was any doubt as to the real issue which the jury tried, nor because the defendant might have made up some other issue, if he had pleaded. The reasons for these

decisions are entirely different from what this argument presumes. The real ground on which these decisions rest is, that by common law the court has no right to make up the issue and empanel a jury to try it; but the parties by their pleadings must first come to an issue, and then it is tried by a jury. When, therefore, the record shows, that the parties by their pleadings have not come to any issue, but nevertheless the record shows that the issue was tried, this issue must either have been illegally made up by the court or by a blunder it must have been assumed to have been made up by the parties, when in fact it was not.

In some of the cases we have cited, the record showed distinctly what was the exact issue tried by the jury, and also that the verdict was distinctly responsive to such issue; and that it was the only issue the parties in the particular case could have made, had they by the pleadings made any issue. Yet the judgments were reversed, because no issue so far as the record showed, had been formed. It has thus been held as absolutely necessary in every case, that an issue shall be made up by the pleadings, before a jury can be empaneled to try the case.

The *State v. Conklin alias Swank*, 16 W. Va. 736, and *The State v. Douglass*, 20 W. Va., show, that on indictments for felony, if the defendant does not plead, but the jury is nevertheless sworn to try the issue, which could be only on the plea of "not guilty," and he is found guilty of the felony charged in the indictment, though there can be no doubt, that precisely the same issue and verdict would have resulted, had the defendant put in the only plea he could have put in; yet this court has, nevertheless, reversed such judgments entered on such verdicts, the court having no authority to empanel a jury, in that or any case, till an issue has been made up by the parties; and therefore a verdict rendered by a jury when no issue has been so made up, must be treated as a mere nullity.

So in the cases of *Taylor et al. v. Huston*, 2 H. & M. 101; *Rowans v. Givens*, 10 Gratt. 250; and *Gallatin's Heirs v. Haywood's Heirs*, 4 W. Va. 1, the jury were sworn in cases of writs of right, and rendered verdicts on which the courts entered up judgments. But in each of these cases the appellate court reversed the judgments because the record did not show that the defendant had plead, or that any issue had been joined by the parties. Yet in these cases

as in all other cases of writs of right, the jury were sworn in the words of the statute: "You shall say the truth whether C. D. hath more right to hold the tenement which A. B. demandeth against him by his writ or right, or A. B. to have it as he demandeth." Thus the issue actually tried by the jury in these cases as distinctly appeared on the face of the record as it could possibly have appeared, had the defendant put in his plea, and it is precisely the same issue as would have been tried, had the defendant filed his plea. Yet no plea having been filed so far as the record showed, the appellate courts set aside judgments on verdicts, rendered when the record showed distinctly the issue joined; and when it was precisely the issue which would have had to be formed by the parties, merely because it had not been formed by the pleadings of the parties.

The courts obviously act on the principle, that by the common law and our universal practice, no jury can be empaneled and no case can be tried, till there has been an issue made by the pleadings of the parties, and that such was the case must appear by the record. It is obvious, that the jury cannot be empaneled to try an issue never formed by the parties by their pleadings, any more in an action of ejectment than in a writ of right, for which it has been substituted. The same reasons applying in both cases, and indeed in all cases, whether civil or criminal. It is a fundamental principle of the common law, that the parties by their pleadings must come to issue before any cause can be disposed of or tried by a jury.

The attorneys for the defendant in error, rely on the case of *Douglass v. The Central Land Co.*, 12 W. Va. 505, to sustain his position, that because there can be but one issue in an action of ejectment and but one plea in such action, the failure to put in this plea or form this issue ought not to prevent the court from rendering a judgment on the verdict of the jury in such a case. In that case it was held, that as there could be but one conclusion to the plea of *non assumpsit*, and that conclusion was necessarily to the country, it was unnecessary formally to add to it, in order to make the plea good. The decision was obviously right, and in full accord with the decisions in Virginia and in this State.

But surely it is one thing for the courts after a verdict, to construe pleas liberally to sustain a verdict and judg-

ment thereon, and in so doing carry out the liberal spirit shown by the legislature in the statutes of jeofail; and quite a different thing for the courts to dispense with pleading altogether, and permit cases to be tried by juries in which the defendant has not plead at all, and allow judgments to be entered upon such verdicts.

For this reason the judgment of the circuit court of Kanawha, rendered on December 20, 1875, must be set aside, reversed and annulled, and the plaintiffs in error must recover of the defendant in error, his costs about his writ of error in this court expended, and the verdict of the jury must also be set aside and annulled, and this cause must be remanded to the circuit court of Kanawha, to be further proceeded with according to the principles as laid down in this opinion and further according to law.

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FAUROT v. PARK NATIONAL BANK.

Appellate Court of Illinois, First District. 1890.

37 Illinois Appellate, 322.

WATERMAN, J.: In this case it appears that attachment proceedings were begun by the Park National Bank against Benjamin C. Faurot, on the 12th day of April, 1889. Faurot appeared by attorney May 21, 1889, and on the 15th day of June, 1889, filed his plea of the general issue.

On the 18th of June the default of Faurot "for want of a plea" was taken, and judgment was entered against him for \$3,829.74.

It is doubtless the case that neither the court nor the plaintiff below were aware that a plea had been filed when the default was entered. However this may be, with a plea on file, it was error, without some disposition of the plea, to enter the default of Faurot. *Parrot v. Goss*, 17 Ill. App. 110; *Mason v. Abbott*, 83 Ill. 445; *Sammis v. Clark*, 17 Ill. 398; *Steelman v. Watson*, 5 Gilm. 249; *McKenney v. May*, 1 Scam. 334.

Reversed and remanded.

BATES v. LOOMIS.

*Supreme Court of New York. 1830.**5 Wendell, 134.*

Motion that writ of inquiry be executed at the circuit. The action was for an assault and battery. The day laid in the declaration was the second day of January, 1830. The defendant did not plead, and a writ of inquiry was executed and an inquisition found for \$200 damages, which inquisition was set aside and a new inquiry held. On the hearing before the sheriff and the jury, the plaintiff proved that on the day laid in the declaration he was severely beaten, but did not prove that the defendant inflicted the injuries complained of. The counsel for the plaintiff insisted that the defendant, by his default in not pleading, admitted, not only that he had been guilty of an assault and battery, but also that he had been guilty of the assault and battery committed on the plaintiff on the day laid in the declaration. This was denied by the counsel for the defendant, who contended that, though the default admitted an assault and battery, it did not admit the assault and battery committed on the day laid in the declaration; and as there was no proof that the defendant committed the injuries suffered by the plaintiff on that day, the plaintiff was entitled to nominal damages only. * * *

By the Court, MARCY, J.: A default in a case like this admits an assault and battery; but it does not, I apprehend, entitle the plaintiff to anything more than nominal damages. It admits only the traversable allegations in the declaration. Neither the specific day when the injury was done, nor the circumstances of aggravation are traversable. They are not, therefore, admitted by the default. A plea in this case denying a battery on the second day of January (that being the day laid in the declaration) would have been clearly bad, because the plaintiff, to entitle him to recover, is not confined in his proof to a battery on that day. The admission by the default is of a battery committed within the period to which the plaintiff is confined by his proof. The battery may have been on the second day of January, but not necessarily so. It may as well have

been on any other day in any of the three or four preceding years. If the plaintiff received on that day a personal injury, the default does not establish the fact, in the absence of all other proof, that the defendant inflicted it. Before damages can be awarded against him for it, the plaintiff must show, either by direct proof or by circumstances, sufficient to produce a reasonable conviction in the minds of the jury that the defendant inflicted the injury.

SECTION 2. SEVERAL PLEAS TO THE SAME COUNT.

GULLY v. THE BISHOP OF EXETER.

Court of Common Pleas. 1828.

5 Bingham, 42.

In this case, the plaintiff in *quare impedit* having been obliged to trace his title through a period of two centuries, and the defendant having in forty-three pleas traversed every allegation in the declaration, although the plaintiff's claim rested solely on the validity of a deed of 1672, which the defendant sought to invalidate by setting up a subsequent deed of 1692, the court rescinded the rule to plead several matters, as having been made an improper use of.

E. Lawes, Serjt., thereupon obtained a new rule *nisi* to plead the several matters following: * * *

Wilde, Serjt., now showed cause, and objected, as before, that all the pleas except those which disputed the validity of the deed of 1672, and asserted the validity of the deed of 1692, were an abuse of the rule to plead several matters, being calculated only to put the parties to a great expense, and wholly immaterial to the merits of the cause, so that if the defendant succeeded on them he would gain nothing.

* * * * *

BEST, C. J.: I am glad this question has been fully brought before the court; for though merely a matter of practice it is a point of great importance. On the decision of this question it depends, whether suits shall be carried on at great and unnecessary expense, or whether the real object of pleading shall be attained—that of reducing causes to a single point to be tried.

At common law a defendant was permitted to plead one plea only, and it was a principle that pleadings ought to be true. That can rarely be the case when many pleas are pleaded. But as it was sometimes found difficult to comprise the merits of a defence in a single plea, the Statute of Ann permitted a party to plead as many as might be necessary to his defence, provided he obtained leave of the court; thereby confining him to such as might be deemed, in the discretion of the court, essential to the justice of his cause. We have enough of the merits of this cause before us to see what justice requires. The living in dispute was conveyed by a deed of 1672; the defendant claims under a deed of 1692, under such circumstances, that if the deed of 1672 is valid, the defendant can have no interest in the property. The justice of the case, therefore, requires that the defendant should plead nothing that does not tend to show the invalidity of the deed of 1672. He, however, insists on going into matters long subsequent even to the deed of 1692. But if his right accrues from that deed, what can he have to do with the subsequent matters?

It has been urged that it is in vain to require the plaintiff to make certain allegations, if the defendant may not deny them. But the object of pleading would be defeated, as it is already in some actions, if the defendant were to put the plaintiff upon tracing his whole title. The object of pleading is to narrow the matter in dispute to a single point; and a defendant ought not to be permitted to traverse a series of facts wholly immaterial to his own claim. Here he ought to break in on the plaintiff's title but once; that is, to dispute the validity of the deed of 1672. He may find it advisable to do that in more ways than one, and, therefore, he may add the plea of *non concessit*, but he shall only dispute the plaintiff's title in the point material to him. The practice in criminal proceedings, which has been alluded to, bears no analogy to the present question. The humanity of our law allows the prisoner to put the prosecutor upon proving his case in every particular; but in civil proceeding the interest of both parties requires that they should be put to as little expense as possible. Perhaps we may not be able to return to the ancient simplicity of pleading; but we must approach it as nearly as we can, and remove, if it be possible, that reproach which has lately been so justly cast on the administration of justice. It is

an important duty of the court to exercise its discretion as to pleas, and to render justice as cheap and as expeditious as possible.

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GASELEE, J.: The Statute of Ann would never have been passed if such abuses had been anticipated as have taken place. The existing practice has given a defendant a most inconvenient advantage over a plaintiff. Before the passing of the Statute of Ann, a party might have two or three substantial defences to an action, and yet could only bring forward one. The statute has enabled him, where he has more than one, to plead it, with the permission of the court. Has he more than one in the present case? He may endeavor to perplex the plaintiff, but his only defence rests on the alleged invalidity of the deed of 1672. • • •

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The true principle of pleading several matters is, that if the justice of the case requires that a party should allege several defences, the court will not prevent it; but they will not allow a party to plead, merely for the purpose of throwing difficulties in the way of his opponent. In the present case there is nothing essential to the defendant's case, but to contest the validity of the deed of 1672. The defendant, therefore, shall be put to elect which link of the plaintiff's title he will contest; and if he contests the deed of 1672, he may plead *non concessit*, and that the deed was fraudulent.

CONNELLY v. PIERCE.

Supreme Court of New York. 1831.

7 Wendell, 129.

Demurrer to plea. The plaintiffs declared in covenant on a contract bearing date 30th May, 1827, whereby, after reciting that the defendant on the 10th day of April, then last past, had purchased at a sheriff's sale, by virtue of executions against a certain person, 88 acres of land; and that in consideration of \$320 paid to him by the plaintiffs, he had bargained and sold to them 40 acres off of the north part of the premises purchased by him, the defendant

covenanted and agreed that he would convey to the plaintiffs, by a deed of warranty, the said 40 acres, at the expiration of 15 months from the time of the sheriff's sale, provided the title to the premises should be vested in him by virtue of the sheriff's deed. The plaintiffs averred that on the 10th day of July, 1828, the title to the premises purchased by the defendant was vested in him by virtue of such deed, but that he refused to convey to them, although requested so to do. The defendant interposed several pleas, and among others, that he was not requested by the plaintiffs, on the 10th July, 1828, or at any time afterwards, to convey to them the 40 acres; nor did he on that day, or at any time afterwards, refuse to convey the same. To this plea the plaintiffs demurred, and assigned for cause of demurrer, that the plea was double: in alleging that the defendant was not requested, and that he did not refuse. The defendant joined in demurrer.

By the Court, SAVAGE, Ch. J.: The rule in pleading is, that a plea may contain as many facts as are necessary to make out one point, or one defence. The defence relied on by the plea demurred to is that the defendant is not in default by refusal to give a deed on demand. It was not necessary to his defence, to have negatived both facts; for if the deed had never been demanded of him, that alone is an answer to the plaintiff's declaration; and if, upon demand, the defendant did not refuse, but offered to convey, that also is an answer. The two facts are closely connected, and the defendant could not be compelled to admit either fact; but to deny both, it must be done in separate pleas. Either allegation in the plea being a good defence to the action, that settles the question as to the point of form against the defendant. He cannot plead two defences in the same plea; he may plead as many defences as he has, but each defence must be stated in a separate plea. In *Strong v. Smith*, 3 Caines, 160, the court held there was no duplicity in the plea, because the point of defence being the defendant's right to enter the *locus in quo*, he had shewn that right by setting forth two facts, both necessary to establish the right, to-wit, seisin in the trustees of the town, and their demise to him. In *Tucker v. Ladd*, 7 Cowen, 450, the defence was a set off, and to shew the defendant's right to the set off, it became necessary to allege that the plaintiffs were trustees for a third person, and that the defend-

ants had a judgment against such person. Both allegations were necessary to make out the point of defence. But in *Service v. Heermance*, 2 Johns. R. 96, where, to a plea of discharge, under the insolvent act, the plaintiff replied five several acts, each of which was sufficient to avoid the discharge, the court held the replication bad, for duplicity. And a similar decision was made in *Cooper v. Heermance*, 3 Johns. R. 315. In this case the defendant has coupled in the same plea two facts, each of which, taken separately, although there is an apparent connection between them, is a sufficient defence to the plaintiffs' action. The plea is therefore faulty in point of form; and it is so because the several matters which it contains are good defences in law.

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McALEER v. ANGELL.

Supreme Court of Rhode Island. 1897.

19 Rhode Island, 688.

January 16, 1897. TILLINGHAST, J.: This is assumpsit to recover the sum of \$172.80 for certain stone furnished to the town of North Providence for highway purposes.

In addition to the general issue, the defendant has filed a special plea in bar, in which he sets up that the plaintiff ought not to have and maintain his action because at the time of contracting said debt the said town had incurred debts to the limit allowed by law, and also that there was no money in the hands of the defendant town treasurer at that time, nor has there been any money in his hands at any time since then, with which said debt could have been paid.

To this plea the plaintiff demurs on the grounds: (1) That it is bad for duplicity. * * *

We do not think the plea is bad for duplicity. A double plea is one which consists of several *distinct and independent* matters alleged to the same point and requiring different answers. Gould's Pleading, p. 420. But this rule is not violated by introducing several matters into a plea if they be constituent parts of the same entire defence. 1

Chit. p. 512; *Handy v. Waldron*, 18 R. I. 567. Without the allegation objected to in the plea before us it would not state a full defence to the action, and hence would be demurrable because notwithstanding the fact that the town had reached its debt limit when this bill was contracted, yet there might have been money in the treasury at that time which had been specially set apart for the payment of claims like the one in suit; and if the town had the means in its treasury to meet this indebtedness, or would have it in anticipation of its current revenue, the contracting of the liability, even though the town then was up to its debt limit, would not be a violation of the statute. Dill. Mun. Cor. 4 ed., sec. 135; *Dively v. Cedar Falls*, 27 Ia. 227 (232); *Barnard v. Knox County*, 105 Mo. 382 (391).

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STARKWEATHER v. KITTLE.

Supreme Court of New York. 1837.

17 *Wendell*, 20.

This was an action of assumpsit, tried at the Washington circuit, in November, 1834, before the Hon. ESEK COWEN, then one of the circuit judges.

The plaintiffs read in evidence a note given to them by the defendant for \$93.53 bearing date the 9th July, 1833, payable one day after date, and rested. A son of the defendant proved that in March, 1834, by the direction of his father, he went to the office of Messrs. Ingalls & Powell, attorneys at law, in whose hands the note in question was, for the purpose of paying the same, and he then paid to Powell \$10 in cash and a promissory note payable at a bank for \$92.28, made by a firm doing business under the name of Baker and Walbridge, and demanded the note in question; that Powell refused to deliver up the note, saying that he would apply the payment to accounts against the defendant in his hands, in such manner as he pleased, and that Powell gave him a receipt, which he handed to his father. Powell testified on the part of the plaintiffs, that the receipt he gave the defendant's son specified that the pay-

ment was made on account of demands in favor of Walter W. Webb, and that he accordingly applied the same to demands in the hands of his firm in favor of Webb. He further testified that nothing was said by the defendant's son about applying the payment to the note in question. The plaintiffs also read in evidence a *bill of particulars* in a cause of Walter W. Webb against the defendant, delivered by the defendant's attorney in that suit, in which, among other items claimed by the defendant, was a receipt of Messrs. Ingalls & Powell, for \$102.28, of the date of 7th March, 1834, and Powell testified that he never gave Kittle any receipt on the Webb demands other than that given to the defendant's son, as testified to by him. The defendant's counsel objected to the bill of particulars, produced as above, being received in evidence, but the objection was overruled by the judge. Kittle, the witness, further testified, that his father never sanctioned the application of the payment made by him to any other demand than the note in question, that he claimed to have paid the account to which Powell said he would apply the payment, and that it was a disputed and contested account. The counsel for the defendant insisted that the cause should be submitted to the jury to pass upon the question of payment; but the judge decided that under the testimony in the case it was wholly a question of law for the court to say whether the note had been paid, and that he was of opinion the note had not been paid, but that the amount paid by the defendant's son had been applied to the Webb demand, by the assent of all parties; that it had been so applied by Powell, and that defendant had adopted the application by setting it forth and claiming it in his bill of particulars in the suit of Webb against him. The defendant excepted to this decision, and the jury, under the direction of the judge, found a verdict for the plaintiffs for the amount of the note and interest. The defendant moves for a new trial.

By the Court, BRONSON, J.: * * * The particulars cannot be evidence against the party furnishing them, in any case, or for any purpose, where the pleading or notice to which the bill relates would not be evidence.

An admission in pleading is evidence against the party making it on the trial of the particular issue to which the admission relates; but an admission in one count of a declaration is not evidence against the plaintiff under any other

count; and where the defendant pleads several pleas, the plaintiff cannot use an admission in one plea for the purpose of establishing a fact which is denied in another. *Harrington v. Macmorris*, 5 Taunt. 228. The Supreme Court of Massachusetts laid down a different rule in the action of slander. *Jackson v. Stetson*, 15 Mass. R. 48; *Alderman v. French*, 1 Pick. 1. These decisions have not been followed elsewhere, *Cilley v. Jenness*, 2 N. Hamp. R. 89, and they are much shaken at home by the recent case of *Melvin v. Whiting*, 13 Pick. 184.

* * * The party may make an admission in one suit or one plea, which he would be very unwilling to follow in another. A fact which is either directly or impliedly admitted in pleading, will be deemed true for all the purposes of that issue; but it may still be that the fact does not exist, and that it was only conceded in the particular case because the party did not think it important in relation to that matter to put it in issue.

In this case the defendant was sued by the plaintiffs and also by Webb. He had made a payment which he was entitled to have allowed in one of the suits. He pleads or gives notice of the claim in both suits; and if the doctrine laid down at the circuit were fully carried out, he has forfeited the payment, and cannot have it allowed in either suit. The judge held that the defendant was concluded in this suit by having set up and claimed the payment in the Webb suit. If the same doctrine should be applied on the trial of the Webb suit, the defendant would be again concluded by having set up and claimed the payment in this; and the result would be that he must lose the money altogether. This shows, I think, that the bill of particulars was improperly received in evidence. In the suit to which it belongs it will perform its appropriate office; but in this action it should neither conclude the defendant nor prejudice his rights.

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New trial granted.

ORGILL v. KEMSHEAD.

Court of Common Pleas. 1812.

4 Taunton, 459.

Marshall, Serjt., had obtained a rule *nisi* for leave to plead several matters to an action of covenant for nonpayment of rent. The pleas suggested were, 1st, *non est factum*; 2nd, no rent in arrear; 3rd, to the first and second counts, that the defendant had, before the rent became due, assigned the premises to Joshua Robinson, who had tendered the rent; 4th, to the third and fourth counts that the defendant, before the rent became due, assigned to Joshua Robinson, who assigned to J. S. who tendered the rent; and 5th, a tender of all the rent by the defendant.

* * * * *

MANSFIELD, C. J.: The pleas are clearly repugnant. If the defendant assigned a lease, it must have existed; and if the defendant tendered rent, it was not rent which had never become due.

The court made the rule absolute to plead the other pleas, striking out the *non est factum*.

LECHMERE v. RICE.

Court of Common Pleas. 1799.

2 Bosanquet & Puller, 12.

Williams, Serjt., shewed cause against a rule *nisi* for pleading to an action of debt on bond; first, *non est factum*; and secondly, that the bond was given upon an usurious consideration; and contended, that although usury was not, strictly speaking, an unconscientious plea, yet, that as it is the constant practice of the court to refuse a rule of this kind where the pleas are inconsistent, they would not depart from that rule in the present instance. He also relied on an affidavit, stating that the witness to the bond lived in Worcestershire, and that the plaintiff would be put to great expense if he were obliged to bring him to London where the venue was laid.

Shepherd, Serjt., in support of the rule, insisted, that the object of pleading *non est factum* was to oblige the plaintiff to produce the witness to the bond, in order that the defendant might have the opportunity of cross-examining him as to the usury.

The court were of opinion that the two pleas were not more inconsistent than many which are allowed to be pleaded together, as not guilty to an assault and a special justification; and that probably the true reason for opposing this rule was, as had been suggested, to keep the attesting witness out of the way. They observed, that the court of common pleas only continued to exercise an authority over applications for pleading several matters (**which** had originally been the practice of the King's Bench **also**) in order to prevent an oppressive use being made of that liberty which is given by the statute.

Rule absolute.

PETERS v. ULMER.

Supreme Court of Pennsylvania. 1873.

74 Pennsylvania State, 402.

This was an action on the case for slander brought to the November term, 1872, of the court below, by Frederick Ulmer and Sophia his wife against John Peters and Margaret his wife.

The declaration was that Mrs. Peters had uttered words imputing adultery to Mrs. Ulmer. The defendants pleaded "not guilty."

On the trial April 8, 1873, before HAMPTON, P. J., the defendant had leave to add the plea of justification, and by order of the court, the plea of "not guilty" was withdrawn. The defendants excepted to this order of the court and a bill of exceptions was sealed.

* * * * *

SHARSWOOD, J.: The first assignment of error is, that the court below refused to allow the defendant to plead "not guilty" as well as justification, and in ordering the defendant to withdraw the plea of "not guilty." The ground upon which this order was made appears to have been that

the pleas were inconsistent. Under the Statute of 4 Anne, c. 16, sec. 4, Roberts's Digest, 42, which first permitted a defendant, with the leave of the court, to plead as many several matters as he should think necessary to his defence, it was the practice at first for the court to refuse leave when the proposed pleas were inconsistent, but in modern practice such pleas, notwithstanding the apparent repugnancy between them, are permitted. 1 Troubat & Haly, part 1, p. 470. Thus, to go no further, what seems to be more inconsistent than to an action upon a bond to plead *non est factum* and payment—to deny the execution of the bond by the defendant, and yet to allege that he had paid it? The only exception which appears to be recognized is the general issue and tender, and there is a good reason, perhaps, for not allowing these to be pleaded together; for if a verdict were found for the defendant on the general issue, this incongruity would appear upon the record, that nothing was due, though the defendant had admitted on the record, by pleading the tender, that something was due. *Maclellan v. Howard*, 4 Term Reports, 194. In *Kerlin v. Heacock*, 3 Binn. 215, the short entry of "not guilty, with leave to justify," was considered, as in fact several pleas of not guilty and a justification, and no remark was made by the court as to their inconsistency. In truth they are not inconsistent. The defendant in slander may believe and allege that he never used the words imputed to him, but as human testimony is fallible and uncertain, he may well fortify himself by adding, if the plaintiff succeeds in proving that I did say the words, they were true. Against an unscrupulous plaintiff of bad character—especially since the Act of Assembly allowing him to be a witness in his own behalf—it may be the only safe line of defence. The discretion vested in the court by the Statute of Anne to refuse leave to put in more than one plea, is clearly a legal discretion, not to be exercised unless good reason exists. Where, as here, it was refused to allow an amendment of the pleadings, it was error, under the Act of March 21, 1806, sec. 3, 4 Smith's L. 329. In *Smith's Administrator v. Kessler*, 8 Wright, 142, where, after a plea of payment, the defendant was refused leave to put in a plea of *non assumpsit*, the court reversed the judgment.

Judgment reversed, and venire facias de novo awarded.

* * * * *

DOUGLASS v. BELCHER.

*Supreme Court of Tennessee. 1834.**7 Yerger, 104.*

This was an action of debt brought by the plaintiffs in Marion County Court. The defendant pleaded in abatement of the summons that it was not signed by the clerk, but by some person not by him authorized to do so. At the same time several pleas in bar were filed. The plaintiffs replied to the pleas in bar, and issues were taken, and moved the court to strike out the plea in abatement. The court sustained this motion, and the plea was stricken out, and upon the trial of the issues there was a verdict and judgment for the plaintiffs. The defendant appealed in error to the circuit court, where the county court judgment was reversed and plaintiff required to reply to the plea in abatement. From this judgment an appeal in error is prosecuted to this court.

GREEN, J.: The county court did not err in striking out the plea in abatement. A plea in abatement cannot be pleaded at the same time with a plea in bar. 1 Bac. Ab. 26; 1 Mass. Rep. 538. The plea in bar is inconsistent with the plea in abatement, and, by answering the plaintiff's action, overrules the plea in abatement. That plea was, therefore, properly stricken out by the county court, and the circuit court erred in reversing that judgment.

The judgment of the circuit court will be reversed, and, proceeding to render such judgment as that court ought to have given, the county court judgment will be affirmed.

* * * * *

*Judgment reversed.²³***23. Pleas must be pleaded in due order, and that order is as follows:**

1. To the jurisdiction of the court.
2. To the disability of the person.
 - a. Of the plaintiff.
 - b. Of the defendant.
3. To the count or declaration.
4. To the writ.
 - a. To the form of the writ.
 - (1) For matter apparent on the face of it.
 - (2) For matter dehors the writ.
 - b. To the action of the writ.
5. To the action itself in bar thereof.

In this order the defendant may plead all these kinds of pleas successively. But he cannot plead more than one plea of the same kind or degree. Thus, he cannot offer two successive pleas to the jurisdiction, or two to the disability of the person. *Stephan on Pleading* (Tyler's Ed.) 373.

"The power of pleading several matters extends to pleas in *bar* only, and not to those of the dilatory class, with respect to which the leave of court will not be granted."—*Stephan on Pleading* (Tyler's Ed.), p. 266.

SECTION 3. PLEAS TO SEVERAL COUNTS.

MURPHY v. FARLEY.

Supreme Court of Alabama. 1899.

124 Alabama, 279.

HARALSON, J.: 1. The complaint declared in two separate counts, on two promissory notes. There were three pleas interposed to the entire complaint—the general issue, failure of consideration, and a special plea of set-off. The plaintiff moved to strike these pleas for the alleged reason that they were not pleaded to each count separately, but to the entire complaint, and the motion was granted. This ruling was erroneous. If the pleas were good to each count, there was no necessity to plead them to each separately; and, in such case, by interposing them to the entire complaint, each count thereof was pleaded to. * * *

* * * * *

THE AMERICAN INSURANCE COMPANY v. HOLLY.

Supreme Court of Illinois. 1876.

81 Illinois, 353.

SCHOLFIELD, J. delivered the opinion of the court. The ruling of the court below complained of is, in sustaining a demurrer to appellant's special pleas. The declaration contains two special counts and the consolidated common counts. The pleas profess to answer the whole declaration, but in fact the matters pleaded, even if otherwise free from objection, answer only the special counts,

and leave the common counts unanswered. For this reason alone, therefore, the demurrer was properly sustained. *Moir et al. v. Harrington et al.*, 22 Ill. 40. The judgment is affirmed.

Judgment affirmed.

SECTION 4. JOINT AND SEVERAL PLEAS.

TROUTNER v. PARENT.

Supreme Court of Indiana. 1853.

4 Indiana, 232.

DAVISON, J.: This was an action of debt by Parent against Troutner, Colerick, and Dawson, on an injunction bond. The bond is in the sum of 100 dollars, conditioned as follows: Whereas the above named Troutner, at the July term of the Allen Circuit Court, filed his bill in chancery, praying an injunction against the said Parent, which injunction was on that day granted by the judges of said court in open court; now if the said Troutner shall well and truly pay to the said Parent all damages and costs which may accrue in consequence of said proceeding, provided the said injunction granted in this case shall be dissolved, then the above obligation is to be void and of no effect; otherwise to be and remain in full force, etc.

The breach assigned, is, that at the July term of the said Allen Circuit Court, in the year 1845, by the judgment and decree of said court, the said injunction was dissolved and said bill dismissed, as it appears of record, etc.

Colerick and Dawson were defaulted. Troutner obtained oyer of the bond and condition, and filed two pleas: 1. *Non est factum*. 2. Performance generally. A demurrer to each plea was sustained, a writ of inquiry awarded, damages assessed, and judgment rendered for the plaintiff below.

The only error assigned is the sustaining of the demurrer to the pleas.

The defendant in error contends that the pleas are defective, because they are the separate pleas of Troutner; that

in actions founded upon a joint or joint and several contract, codefendants cannot sever in their pleas. We think this is a mistake. The rule seems to be, that when the defence is in its nature joint, several defendants may join in the same plea, or they may sever. And one defendant may plead in abatement, another in bar, and another may demur. 1 Chitty's Pl. 596; Archbold's Civil Pl. 239; Gould on Pl. 422, s. 6.

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CLARK v. LATHROP.

Supreme Court of Vermont. 1860.

33 Vermont, 140.

Trespass for false imprisonment.

The defendants jointly pleaded two special pleas in justification. The first plea set forth that the plaintiff had been duly elected and qualified constable and collector of Chelsea for the year 1854; that a tax was legally voted on the list of that year, and with a legal warrant was put into his hands for collection; that he proceeded to collect the same, and was delinquent in paying over to the proper authorities; and further set out the proceedings for, and the regular issuing of, and extent against him, under which, after due demand, he had been committed by the defendant, Lathrop, as constable of Chelsea. * * *

* * * * *

Neither plea attempted in any way to connect the defendants, Cabot and Hude, with the acts of Lathrop, set out in the pleas.

To these pleas the plaintiff demurred specially, on the ground that the pleas were joint and did not allege any facts in justification of two of the defendants or show any connection between them and the petition and extent. * * *

* * * * *

POLAND, J.: I. The defendants, by pleading a special justification of the trespass and imprisonment, admit their liability unless their plea shows a sufficient legal answer.

All having joined in the same pleas, they must show a good justification for all, or else they are good for neither.

These are familiar rules of pleading given in all the books on that subject.

Conceding that the facts set forth in the pleas furnish a good answer for Lathrop, the constable, who committed the plaintiff upon the extent, they are no defence to the others, for the pleas do not attempt to connect them with the justification at all, by stating that they acted under the constable as his aids or assistants, or that they were selectmen, or other officers of the town, and put the extent into the hands of the constable for execution. As they do not show themselves in any way connected with the justification, and have, by joining in the plea, admitted their connection with the trespass on the plaintiff, the pleas are bad as to them. If the defendants, Hude and Cabot, rely on showing they had not any connection with the arrest and imprisonment of the plaintiff, they should have plead the general issue.

As before said, this renders the pleas insufficient to justify the officer also.²⁹ * * *

* * * * *

29. "The reason is, that the court cannot sever the justification, and say that one is guilty, and the other is not, when they all put themselves on the same terms. This rule is a very artificial one, and ought never to be extended beyond the very cases to which it has been applied; and it may safely be asserted, that it never has been extended to the general issue of not guilty, pleaded jointly. In the case of *assumpsit*, if the defendants plead the general issue jointly, the plaintiff is bound to prove a joint assumption, and if he fails in doing this, he cannot succeed. * * * There is no reason to be given, requiring the defendants to sever in the plea of the general issue, and there is no case which inculcates the doctrine."—*Higby v. Williams* (1819) 16 Johns. (N. Y.) 215.

MORROW v. BELCHER.

Court of King's Bench. 1825.

7 Dowling & Ryland, 187.

Declaration in trespass against Thomas Belcher, Caroline Watson, and Thomas Foster, for an assault and false imprisonment. Pleas: first, by all the defendants, not guilty, and issue thereon. Second, by Belcher, a justification, in defence of the possession of his house. Third, by Fowler, as servant of Belcher, the like justification. Re-

plication to the second plea, that Belcher committed the trespasses with more force than was necessary for the purpose in that plea mentioned. Rejoinder by all the defendants, to the replication to the second plea, that all the defendants were not guilty of committing the trespass with more force than was necessary. Similar rejoinder to the replication to the third plea. Demurrer to the above rejoinders, assigning for cause, that as Belcher and Foster pleaded separately in the second and third pleas, and the plaintiff replied that they separately were guilty of more force than was necessary, the rejoinder by all the defendants, that all the defendants were not guilty of committing such excess, is bad in law. Joinder in demurrer.

* * * * *

BAYLEY, J.: Two of these defendants have pleaded separately a special plea respectively, but the other has pleaded no special plea. The plaintiff complains of a joint and several trespass committed by the three defendants. One of the defendants says, "I have no justifiable reason for committing the trespass, but I deny the fact." The others also deny the fact, but they respectively plead a justification. The plaintiff replies, that those two defendants were respectively guilty of excess, for they had used more force than was necessary to expel him from the house. The defendants reply, that they were not all guilty of excess. Now they were not all charged with excess, and therefore their rejoinders do not pursue the pleas originally pleaded, and are consequently demurrable. * * *

* * * * *

LITTLEDALE, J.: I am of the same opinion. It is a fundamental rule, that the rejoinder should pursue the plea, for otherwise a different kind of issue might be introduced. One of these defendants pleads no special plea whatever. The other two plead distinct special pleas; and then they all come together again in the rejoinder, which is an informal and bad mode of rejoinder. But the defendant, Watson, had no right to rejoin, after having originally pleaded no more than the general issue.

Judgment for the plaintiff.

SECTION 5. PARTIAL DEFENSE.

SOMERVILLE v. STEWART.

*Supreme Court of New Jersey. 1886.**48 New Jersey Law, 116.*

SCUDDER, J.: In an action of assumpsit on a promissory note for \$250, endorsed and transferred by the payee to the plaintiff, after maturity, a declaration was filed containing the common counts, with a bill of particulars of the demand and copy of the promissory note whereon the declaration was founded. In this the defendant pleaded, as to part of the sum claimed, that before the assignment he paid to the payee, on account of said note, the sum of \$35, in two separate payments, for which no credit was given in the bill of particulars. The motion is now made to strike out this plea as sham or frivolous, on the ground that it is no answer to any part of the declaration. * * *

This partial plea is the only answer that is given to the plaintiff's action, and it is in effect a plea of part payment for which the plaintiff has given no credit in his declaration; it is silent as to the balance of the claim. Although payment, in whole or in part, prior to action brought, might be given in evidence under the general issue, according to our practice, yet the defendant is not bound to plead generally, but may also plead specially, and have a distinct issue made on such plea. 1 Chitty Pl. 478, 480; *McKyring v. Bull*, 16 N. Y. 297. A plea of part payment or of partial performance is a good plea, if drawn in proper form. Gould Pl., secs. 102, 103, p. 334.

Where a payment or performance is known and admitted, it is the better practice, in declaring on contracts to pay money, to deliver goods, or perform works, expressly to admit part payment or partial performance on the face of the declaration, to deprive the defendant of all pretence to plead such defence. Chitty Pl. 288, 338. But if this be not done, the defendant, if he have no other defence than a greater credit than is given him in the declaration, should not be driven to plead the general issue, denying the whole claim, under oath, but allowed his specific and true defence

of part payment or performance. It is not necessary that he should answer the whole declaration in one plea, for a plea is good which answers any part of a count which is material and severable, as a basis of recovery. Care must be taken, however, in drawing such plea, that it begins properly, for if it commences as an answer to the whole, but is to part only, it will be bad on demurrer. If it begins by answering only part of the plaintiff's count, and is in truth but an answer to part, and does not, in that or in any other plea, notice the remainder of the declaration, the plaintiff cannot demur to the plea, for it is sufficient as far as it extends, but must take judgment for the part unanswered, as by *nil dicit*. *Fleming v. Hoboken*, 11 Vroom, 270; 1 Chitty Pl. 523; *Grafflin v. Jackson*, 11 Vroom, 440; Com. Dig., tit. "Pleadings," E 1; 1 Saund. 28; 5 Rob. Pr., ch. 19, p. 168.

As to the part answered by the plea of part payment, the plaintiff may enter a *nolle prosequi*, if he is satisfied that it is correct, or, if he disputes the credit claimed, he may reply and put that in issue. In this form the real controversy between the parties may be determined on its merits, or, if there be no further dispute, the plaintiff will receive the sum to which he is entitled under his judgment by *nil dicit*.

While, therefore, this plea of part payment is not an answer to the whole claim of the plaintiff, it is good as far as it goes, and it is not sham or frivolous, or irregular or defective, and will not be stricken out.

Motion refused.

SPRAGUE NATIONAL BANK v. ERIE RAILROAD COMPANY.

Supreme Court of New Jersey. 1898.

62 New Jersey Law, 474.

DIXON, J.: In an action of trespass the plaintiff declared that the defendant with force and arms broke and entered a certain close of the plaintiff, and with force and arms broke and entered certain buildings of the plaintiff, erected

on said close, and ejected, expelled, put out and amoved the plaintiff and its servants from the possession, use, occupation and enjoyment of the said close and buildings.

To this declaration the defendant pleaded, first, the general issue; secondly, *liberum tenementum* in the defendant; and thirdly, *liberum tenementum* in E. B. T. as servant of whom and by whose command the defendant broke and entered, etc., and ejected, etc.

The plaintiff's demurrer to the second and third pleas is now to be considered.

In *Thiel v. Bulls Ferry Land Co.*, 29 Vroom, 212, this court decided that the forcible eviction of a person in the peaceable occupation of realty, although perpetrated by the owner legally entitled to recover possession, was a wrong remediable by the ordinary action of trespass.

On this principle it is evident that these pleas set forth no justification for so much of the alleged trespass as consisted in the forcible expulsion of the plaintiff and its servants.

The defendant urges that the pleas being good as to the breaking and entering, the forcible ejection and expulsion of the plaintiff and its servants should be deemed mere matters of aggravation, and therefore legally answered by the defence to the principal matter, and *Davison v. Wilson*, 11 Q. B. 890, is cited to support this contention. But in that case the personal tort was carefully excluded, both by the pleader and by the court, from the circumstances which were treated as mere aggravation. In Chitty's Forms (2 Chit. Pl. 863, 865), and in *Perry v. Fitzhowe*, 8 Q. B. 757, the forcible expulsion of persons is regarded as substantially distinct from the trespass upon the land. Such also is the clear import of *Thiel v. Bulls Ferry Land Co.*, *ubi supra*.

Consequently the pleas, having in form professed to answer the whole declaration and having in substance legally answered only part, are bad. *Grafflin v. Jackson*, 11 Vroom, 440; *Newark v. Stout*, 23 Id. 35. They should have been limited in their comment to the alleged trespass upon the realty. *Fleming v. Hoboken*, 11 Vroom, 270.

The plaintiff is entitled to judgment on the demurrer.

YOUNG v. FENTRESS.

*Supreme Court of Tennessee. 1849.**10 Humphreys, 150.*

McKINNEY, J., delivered the opinion of the court.

This is an action of debt upon a promissory note for \$750; to the declaration, which is in the usual form, the defendants filed the following plea, viz.:

"And the said defendants come, etc., and say, that they have paid \$65 on the note mentioned in plaintiff's declaration, and this they are ready to verify; wherefore they pray judgment, etc." On which plea issue was taken by writing underneath, the words "replication and issue." And on this single issue the plaintiff went to trial, without judgment by default, or any defence whatever, as to the residue of the debt in the declaration left unanswered by said plea.

The jury found the issue in favor of the defendants, and they further found "the defendants still indebted to the plaintiff in the sum of \$707, the balance of the debt, after deducting said payment, and they assess the plaintiff's damages by reason of the detention to the sum of \$70.70."

Upon this finding of the jury, the court proceeded to render judgment in favor of the plaintiff. The defendants moved for a new trial, and also in arrest of judgment; but the court overruled both the motions, and the defendants have brought an appeal in error to this court.

In 1 Chitty on Pl. 554 (Ed. of 1833), the position is laid down, and Sergeant Williams asserts the same doctrine (1 Saund. 28, n. 3), that if a plea begin only as an answer to part, and is in truth but an answer to part, the plaintiff cannot demur to the plea, for it is sufficient as far as it extends; but must take his judgment for the part unanswered as by *nil dicit*. If he demur, or plead over, the whole action is discontinued. The reason assigned for the discontinuance is, that the plaintiff, in such case, by omitting either to enforce his claim in respect to the part unanswered or to abandon it by entering a *nolle prosequi* thereto, causes a chasm or hiatus in the proceedings.

If this doctrine were correct, we would be compelled to declare the present action discontinued. But the position assumed by Mr. Chitty is contradicted and denied to be law, by very high authorities, both English and American.

In the case of *Bullythorpe v. Turner* (Willes, 475, 480), WILLES, Chief Justice, after reciting the authorities, declares it absurd to say, that the defendant can discontinue the plaintiff's action by putting in a defective plea, and expresses the opinion, that, in all cases of a defective plea, the plaintiff "ought to pray the opinion of the court which he can do no otherwise than by demurring." He refers to *Yelverton* 38, Cro. Jac. 27.

In *Riggs v. Deniston* (3 Johns. cases 205), KENT, Judge, held that, a plea which did not either by denying, or justifying, meet the whole matter or gravamen contained in the count, was for that reason bad. He cites 2 Vent. 193; Cro. Jac. 27; Cro. Eliz. 434. In *Sterling v. Sherwood* (20 Johns. 204, 206), SPENCER, Chief Justice, says, "It appears to me, the position laid down by Mr. Chitty and Sergeant Williams, is not law, and that the cases they refer to do not bear out the proposition." And in the latter case a demurrer was sustained, and judgment rendered for the plaintiff, on the ground principally, that the defendant's plea of justification answered only a part of the libelous matter charged in the declaration.

These authorities, without citing others, are decisive of the question. It is clear, we think, upon principle, as well as upon authority, that a plea which professes only to answer, and does in fact only answer part of the entire gravamen, or cause of action stated in the count, leaving a material part, essential to the plaintiff's right of recovery, wholly unanswered, is demurrable. It may, it is true, in the language of Mr. Chitty, be "sufficient, as far as it extends," but in order to constitute a sufficient answer to the whole declaration, or count, there must be coupled with it, either in the same plea, or in a separate plea, a response to the residue of the count which it omits to answer.

We hold, then, that the present action was not discontinued by replying to the plea, without taking judgment by default as to the part unanswered.

We think the plaintiff, in such case, may, at his election, treat the plea as bad, and demur thereto; or he may waive the objection, and take issue thereon, and demand a judg-

ment by default as to so much of the cause of action as remains unanswered. But it is clear that upon issue taken on such plea, the jury cannot go beyond it, and find in respect to the matter not embraced in the issue; and should they do so, their verdict, thus far, must be wholly disregarded. No judgment whatever can be based thereon.

Hence, in the present case, the verdict and the judgment thereon are altogether erroneous. The plaintiff, having seen proper to take issue on the plea of payment as to part of the debt, should regularly have demanded judgment by default as to the residue thereof. And such judgment might, perhaps, have been entered up at any time during the term of which the issue was tried. 1 Chitty's Pl. 554, n. h.

But, notwithstanding the plaintiff omitted to do so, we think the court, whose duty it was to see that the proper judgment was rendered, had ample authority to direct, and ought to have directed the verdict, as to the remainder of the debt to be set aside, and a judgment by default to be entered up for the residue of the debt. It results that the judgment must be reversed; and proceeding to do what the circuit court ought to have done, we direct that the verdict thus far be set aside, and judgment by default entered.³⁰

30. *Accord*:—Mallory v. Matlock (1845) 7 Ala. 757; Frost v. Hammatt (1831) 11 Pick. (Mass.) 70; Thompson v. Kirkpatrick (1857) 18 Ark. 581.

Contra:—Risher v. Wheeling Roofing Co. (1905) 57 W. Va. 149; Hunt v. Martin (1852) 8 Gratt. (Va.) 578; Southall v. Exchange Bank (1855) 12 Gratt. (Va.) 312; Mager v. Hutchinson (1845) 7 Ill. 266 (cannot be claimed for the first time on appeal); Harrison v. Balfour (1845) 5 Sm. & M. (Miss.) 301 (criticized as a very technical rule, to be relaxed as much as possible by permitting judgment by *nil dicit* to be taken even at a subsequent term).

WILLIAMS v. MINER.

Supreme Court of Errors of Connecticut. 1847.

18 Connecticut, 464.

This was an action of slander. The declaration contained two counts. In the first, the alleged slanderous words were—"He is a thief." In the second, they were—"He is a thief, and he stole the hay and hayseed from Mrs. Dow's

barn." The defendant pleaded the general issue, without notice of special matter in defence, or by way of justification.

* * * * *

CHURCH, Ch. J.: In this declaration there are but two counts, and in both of them the defendant is charged with saying of the plaintiff, that he was a thief. * * *

* * * * *

4. There is, however, another question in this case, which is not free from difficulties, and has been so regarded by other courts before now. It grows out of the rejection of the deposition of Mrs. Dow.

It will be seen, that in this case, the defendant made no attempt at justification, either by plea or notice, which distinguishes the present from some of the cases cited in the argument; but for the purpose of disproving malice, and upon the question of damages, to show that she had, when speaking the words, reasonable ground to believe them to be true, she offered this deposition in evidence, which was rejected by the judge.

The facts claimed to be proved by Mrs. Dow's deposition, were, that the plaintiff took and converted to his own use the hay and hayseed of Mrs. Dow, without her knowledge and against her consent. This evidence, although it would conduce to prove the truth of the charge of theft, yet unconnected with other circumstances, might, and, as we think, did, fall short of it. The *animus furandi* was wanting. The facts offered in evidence did not sufficiently prove the felonious intent; nor did the defendant claim it. And yet they did prove that the property was taken under such circumstances as might and probably did excite reasonable suspicions of guilt, and such as by persons not legally informed, are often supposed to constitute the crime of theft. These facts the defendant wished to prove. The judge at the circuit, controlled, as he supposed, by opposing authority, rejected the proof of them—not because, in the absence of any plea or notice of justification, they established the truth of the charge of theft, but because they tended to that result, though offered for an entirely different purpose. The correctness of this opinion will be examined briefly.

* * * * *

In most actions for torts, as in trespass, assault and battery, false imprisonment, etc., as well as in actions on the case, questions of intention and motive are important as affecting the measure of damages. And they are equally so in actions of slander; and have always been so considered. But it is said that there are certain rules of pleading and evidence known to the common law, which, in cases like the present, will exclude the application of this salutary principle of justice. We recognize and submit to the rule referred to, that the truth of a slanderous charge, either written or spoken, cannot be proved and relied upon in any action for the defamation of character, either in justification or in mitigation of damages, unless the truth of the words has been specially pleaded, or notice of justification has been given. To this extent the rule has been slowly and reluctantly brought; but we know of no adjudged case or principle recognized by the courts of this State, which has confined a defendant within more narrow limits. And our opinion in the present case is not in conflict with this principle.

The defendant here did not offer to justify her charge of theft as a defence, or to prove its truth for any purpose. She admitted her mistake; and only offered to prove facts falling short of the accusation, and reasonably conducing to show that she spoke the words bona fide, or without that degree of malice which otherwise the law might presume against her, and only for the purpose of mitigating damages.

That these are mitigating circumstances, we do not believe will be denied. They have been recognized as such in many cases. In the case of *Sims v. Kinder*, 1 Car. & Pa. 279 (11 E. C. L. 393), BEST, C. J., says: "I am clearly of opinion that any fact which goes to show that the defendant spoke bona fide, and without malice, is admissible in evidence; and further, that it is admissible on the general issue." And in *Knobel v. Fuller*, Peake's Ev. 287, the same judge held, that the defendant, on the general issue, may prove in mitigation of damages such facts and circumstances as show a ground of suspicion not amounting to actual proof of guilt. The same principle is recognized in *Earl of Leicester v. Walter*, 2 Camp. 251, and in *v. Moore*, 1 M. & S. 284. * * * We refer also to *Alderman v. French*, 1 Pick. 1; *Saunders v. Mills*, 6 Bing.

213 (19 E. C. L. 60); *Chalmers v. Shackell*, 6 Car. & Pa. 475 (25 E. C. L. 496); in corroboration of the principle we have stated.

* * * * *

But the claim of the plaintiff is, and he is certainly sustained in this by several American cases, and by some to which we have referred as recognizing the general principle stated, that if the facts relied upon to diminish the presumption of malice tend in any measure towards proving the truth of the charge, they cannot be proved under the general issue. This distinction is certainly a nice one; and if not founded in good sense and obvious necessity, and upon some principle from which it would be dangerous to depart, it ought not to be adopted by us. Unnecessary distinctions should be avoided; they tend only to perplex the administration of justice.

It is quite obvious, we think, that if the mitigating facts objected to cannot be proved under the general issue, they cannot be proved at all; and a defendant, in such case, must be deprived of his essential rights without relief. As they do not constitute a full defence or justification, they cannot be pleaded specially as a defence. They cannot be pleaded in mitigation of damages; for facts affecting the damages merely, and not constituting a defence, can never be specially pleaded. It is intimated, in some of the cases relied upon by the plaintiff, that if the defendant would avail himself of such mitigating circumstances as tend to prove the truth of the charge, he must plead the truth in justification, and then, though he fails of establishing it as a defence, he may have the benefit of these facts in mitigation. But a defendant ought not to be compelled to plead a falsehood in order to avail himself of a truth. Such is not the morality of our law. And it should be remembered, also, that it is said in some cases, that if the defendant fail to support his plea of justification, he shall be punished by aggravated damages, even if he has honestly made the attempt.

We are not satisfied that a defendant should be deprived of the benefit of mitigating circumstances, for no better reason than that they conduce to prove the truth of the charge, while they fall short of it. We see no sufficient cause why he should not be permitted to prove such facts as well as any other, showing innocency of motive, and which can only

be proved under the general issue. Our convictions on this subject are sustained by the cases in this court, and in the English courts before cited, as well as by several in our sister States, and in which the distinction aforesaid has not been recognized, but the general principle has been permitted to prevail. 3 Stephens' N. P. 2579; 2 Starkie on Slander, 95, *in notis*; *Williams et ux. v. Mayer et ux.*, 1 Binn. 92, *in notis*. *Middleton et ux. v. Calloway*, 2 A. K. Marshall's R. 372; *Buford v. McLuny*, 1 Nott & McCord, 268; *Beehler v. Steever*, 2 Wharton, 313; *Wilson v. Apple*, 3 Ham. 270; *Regden v. Wolcott*, 6 Gill & Johns. 413; *Henson v. Veach*, 1 Blackford, 369.

Suppose one is sued in slander, for saying of a mercantile house in the city of New York, that it had failed and become bankrupt; is it not necessary, to the ends of justice, that the defendant in such an action be permitted to prove that the plaintiff's bills had been returned protested, and were not redeemed—that his doors were closed, and his business suspended—in the honest belief of which he had spoken the words, although the affair had turned out to be a mere temporary suspension, and not a failure? And yet all these facts upon which the defendant's bona fide opinion was founded conduced to prove the truth of the words spoken.

That courts of the highest respectability and authority in this country have thought differently from us on this subject we know. We feel the weight of their opinions, while we remain unconvinced by their reasons. These reasons are given by PARKER, C. J., in the case of *Bodwell v. Swan*, 3 Pick. 376, and by the Supreme Court of the State of New York, in *Root v. King*, 7 Cowen, 629. *Mapes v. Weeks*, 4 Wend. 659; *Gilman v. Lowell*, 8 Wend. 573; *Purple v. Horton*, 13 Wend. 9. These reasons are, first, that such evidence would answer all the purposes of the defendant, without exposing him to the just consequences of attempting to justify, and failing in the attempt; and secondly, that the notice to the plaintiff of what is intended to be proved would be withholden. Neither of these reasons, we think, has any force when applied to a case like the present, in which the truth of the words spoken was not attempted to be proved for any purpose. The reasons apply only to cases where the object is, or where the effect would be, to avoid a justification upon the record, while the same

result is attempted in a collateral way. Nothing of that character appears here.

In regard to the first reason assigned. This is predicated, we suppose, upon a principle sometimes advanced in actions for defamation of character, and which we do not intend now to deny; that if a defendant pleads the truth of the words specially in his defence, and fails to prove it, this is an aggravation of his offence, which calls for aggravated damages against him. We shall not discuss the propriety of this doctrine; but we may say, if it be defensible, that we do not consider it of such an essential character as to justify us in sacrificing more important principles for its protection. Nor do we think the second reason assigned, sufficient to justify the doctrine advanced. It is, that if the evidence offered by the defendant may be admitted under the general issue, the plaintiff would not have notice of what the defendant intended to prove. Now, it certainly would be very desirable, if, in all cases, litigant parties should be timely advised of the course intended to be pursued by their adversaries. And many of the rules of pleading and practice were established to promote this purpose. But, where the question is one of damages merely, and not of defence, it is not known that any principle of the common law has hitherto required any such notice. Nor do we see any good reason for distinguishing the privileges of plaintiffs in actions of slander, from the rights of parties in other actions, in this particular. If there be any inconveniences peculiar to this action in this respect, the most appropriate remedy will be found in some rule of court adapted to the case.

Another reason has been suggested, in some of the books, which is, that it might be difficult to draw the line, and restrain the evidence of facts tending to throw suspicion on the plaintiff, within such limits that it should not produce actual conviction in the minds of the jury. We cannot anticipate such a difficulty as of frequent, or hardly as of possible occurrence, in a case like this, where there is neither plea nor notice of justification. It would be presuming too much upon the credulity of a jury, to suppose they would believe a fact to be either proved or true, which the defendant did not claim to be true, and which, by the record, he has disclaimed the right of proving.

It is not our purpose to review the cases relied upon by the plaintiff, to sustain his objection to the testimony offered: we only say, that the prominent reasons for the opinions advanced, are not such as to induce us now, for the first time, to incorporate into our law the principle for which the plaintiff here contends. And we think that the facts offered to be proved by the deposition of Mrs. Dow, should have been admitted, to affect the question of damages in the case, although they had a tendency to prove the truth of the charge.

And for this reason alone, we advise a new trial.

SECTION 6. DEFENSES ARISING AFTER ACTION COMMENCED.

THE PEMIGEWASSET BANK v. BRACKETT.

Superior Court of Judicature of New Hampshire. 1829.

4 New Hampshire, 557.

Assumpsit upon a promissory note. The cause was tried here at November term, 1828, upon the general issue, when it was admitted, that the defendant made the note. It was then shown in evidence, on his part, that a suit was commenced by the plaintiffs against one James Batchelder, on the said note, the same having been made by said Batchelder as principal, and by the defendant and S. A. Pearson, as sureties, and that judgment was rendered in the said suit in favour of the plaintiffs in the court of common pleas for this county, in February, 1827, for \$180.51, being the amount then due upon the note; that an execution issued on said judgment, was delivered to a deputy sheriff in April, 1827, who, on the 28th September, in the same year, received of this defendant the amount of the debt in said execution, and returned the same, satisfied, as to the debt, and not satisfied as to the costs, and afterwards paid over to the cashier of the bank the sum received as aforesaid. This suit was commenced on the 28th May, 1827.

Upon this evidence, a verdict was taken by consent for the plaintiffs, for the sum of \$5.40, being the interest on the note from the time judgment was rendered against

Batchelder, till the time when the money received by the deputy sheriff was paid to the cashier, subject to the opinion of the court upon the foregoing case.

RICHARDSON, C. J., delivered the opinion of the court.

The question is, whether, upon the pleadings in this case, the matter offered in evidence by the defendant is a legal answer to the action.

The manner in which a defendant is to avail himself of any matter of defence, which he may have, depends in some measure upon the time, when such matter of defence arises; whether before or after the commencement of the suit; and there are different forms of pleading founded upon this circumstance. The law makes this distinction on account of the costs of the suit. It would be unjust, that a plaintiff who had rightfully commenced a suit for a just cause be barred by matter arising after the commencement of the action, and subjected to pay all the costs from the beginning. To prevent this injustice, the law compels a defendant to plead matter arising after the commencement of the action in a particular manner, that the court may be enabled to settle the question of costs on just principles.

Where a defendant has a good defence to an action, at its commencement, he may, in general, avail himself of it upon the general issue, and when he cannot thus avail himself of it, he can plead it in bar, and, in either case, if he prevail in the suit, he is entitled to costs.

When any matter of defence arises after the commencement of the action, and before plea pleaded, it may be pleaded in bar of the further maintenance of the suit. If the plaintiff confesses the plea, the action stops, and the defendant is allowed no costs. If the plaintiff elects to proceed and ultimately fails in the suit, the defendant is entitled to his costs arising after the plea was put into the cause. 4 B. & C. 117, *Lyttleton v. Cross*. We have decided, that a general release given after the commencement of the action forms an exception to this rule, and may be pleaded in bar of the action generally. The reason of this is, that when a general release is given, the costs of the suit, up to the time of the release, are presumed to have been adjusted, and cannot be made the subject of any contest in the cause. There is, therefore, no reason why the release should not be pleaded as a general bar. 3 N. H. Rep. 96, *Kimball v. Wilson*. But in such a case, the release must

be pleaded according to the fact as given after the commencement of the action, otherwise it cannot be admitted in evidence.³¹

When any matter of defence arises after plea pleaded, it must be pleaded *puis darrein continuance*; and such plea is a waiver of all the former pleadings.

Such being the nature and objects of pleas in bar of the further maintenance of actions, we should suppose, from the nature of the thing, that the matter of such pleas could not be given in evidence under the general issue as an answer to the action. The general issue, as well as pleas in bar, goes to the commencement of the action. 1 Tidd's Practice, 592; 1 Chitty's Pl. 472.

It seems to have been held in *Bird v. Randall*, 3 Burr. 1345, that matter arising after the commencement of the action might be given in evidence on the general issue. And in *Sullivan v. Montague*, Douglas, 110, it was said, that *actio non* went to the time of plea pleaded. But it is now settled, in England, that matter of defence arising after the commencement of the action, cannot be pleaded in bar generally, but must be pleaded in bar of the further maintenance of the suit. * * *

* * * * *

When matter is pleaded *puis darrein continuance*, it is a waiver of all former pleadings. Why is this, if such matter is evidence upon the general issue? In *Austin v. Hall*, 13 Johns. 286, a release obtained after the commencement of the action was pleaded in bar of the action with the general issue. But no question appears to have been raised upon the form of pleading.

It seems to us, that, from the nature of the case, matter arising after the action brought cannot be given in evidence upon the general issue, as an answer to the action, because it cannot be, in its nature, an answer to the action generally, but only to the further maintenance of the action.

If such matter of defence can be so used, it must, from the nature of the thing, be a good general bar, when specially pleaded; and the rules which have been established

31. Other cases hold that such a release must be pleaded *puis darein continuance*:—*Jewett v. Jewett* (1870) 58 Me. 234; *Field v. Cappers* (1888) 81 Me. 36; *Ryan v. Balt. & Ohio R. R. Co.* (1895) 60 Ill. App. 612; *Cook v. Georgia Land Co.* (1904) 120 Ga. 1068; *Smithwick v. Ward* (1859) 7 Jones L. (S. C.) 64.

with respect to pleas in bar, of the further maintenance of actions are idle and useless. Indeed, they are worse than useless with respect to the defendant, because they deprive him of his costs, in cases where, by using the general issue, he would be entitled to them. If he use the matter as a defence upon the general issue, and prevail in the suit, he will be entitled to his costs from the beginning. If he plead it in bar of the further maintenance of the suit and prevail, he will be entitled at most to costs from the time of filing his plea.

It will be convenient in practice to hold defendants to plead such matter specially. It will give the plaintiff an opportunity to elect whether he will proceed in the action, and the question of costs may be settled by the record. We see no reason why partial payments might not be permitted to be given in evidence upon the general issue to reduce the damages,³² but we are clearly of opinion, that payment cannot be so given in evidence as an answer to the entire action, and that, in this case, there must be

Judgment on the verdict.

32. *Costar v. Davies* (1847) 8 Ark. 213, certain evidence "being confined exclusively to a matter that arose after the commencement of the suit, was admissible alone under the general issue, for the purpose of mitigating the damages, and could not possibly operate as a bar to the whole action." *Accord*:—*Moore v. McNairy* (1827) 1 Dev. L. (N. C.) 319; *Williams v. Tappan* (1851) 23 N. H. 385; *Joy v. Hull* (1832) 4 Vt. 455 (partial payments made pending the suit).

LEE v. DOZIER.

High Court of Errors and Appeals of Mississippi. 1866.

40 Mississippi, 477.

ELLETT, J., delivered the opinion of the court.

The declaration in this case is upon a promissory note. The defendant pleaded the general issue, and at a subsequent term filed two special pleas, as pleas *puis dernier continuance*. The first of these avers that the note sued on was given in payment of land in Louisiana, and that prior to the making of the note, the plaintiff had executed a title bond, a copy of which is filed and prayed to be made

a part of the plea, which instrument the defendant, a non-resident of the State of Louisiana, and ignorant of its laws, understood and supposed to be properly drawn and executed, in accordance with the laws of said State; that after the last continuance of this cause, he ascertained that said instrument was not executed or drawn in accordance with the peculiar laws of said State, in that it was not signed by both parties, nor registered as required by said laws, and is therefore void, and that consequently the consideration of said note had failed.

* * * * *

The plaintiff demurred to both pleas, and the demurrer was sustained; whereupon a jury was impanelled to try the issue, and a verdict and judgment were given for the plaintiff.

Both these special pleas were bad. The first contained no matter that could be pleaded *puis dernier continuance*. The office of such a plea is to set up a matter of defense arising after the last continuance, not one which, existing before, has just come to the knowledge of the party. The facts pleaded in this case were covenant with the execution of the agreement, and were necessarily within the knowledge of the defendant. But he alleges that he had only, since the last continuance, ascertained the law of Louisiana on the subject. That, however, does not alter the case. The matters relied on, that is, the want of his own signature to the contract, and the failure to register it, are not facts that occurred after the last continuance, and therefore cannot be so pleaded.

* * * * *

WILSON v. HAMILTON.

Supreme Court of Pennsylvania. 1818.

4 Sergeant & Rawle, 238.

Jane Hamilton, the defendant in error, brought an action of assumpsit in the common pleas of Lancaster county against John Wilson, executor of John Wilson, deceased, to recover her share of the residue of the testator's es-

tate undisposed of by his will. The defendant pleaded *non assumpsit* and payment, on which issue was joined, and the cause came on to be tried at August term, 1817. After the jury had been sworn and the evidence given, the defendant moved for leave to plead, that since the bringing of the suit, the plaintiff had intermarried with one Joel Baker, who was still in full life. The court thinking themselves bound by the Act of Assembly of 21st March, 1806, admitted the plea. The plaintiff, however, did not reply, and the cause was tried on its merits; the court instructing the jury to regard the plea of coverture as a nullity, and not to suffer it to have any effect on their decision. The verdict was for the plaintiff, and the cause being removed to this court by writ of error, the charge of the court below on the point above stated, as well as on two others which were afterwards abandoned, was assigned for error. It was also contended, that there was error in there being no issue joined on the plea of coverture. * * *

GIBSON, J.: It is very certain a plea *puis darrien continuance* waives all former pleas; that the defendant must stand or fall by it; and that if put in issue it forms the only subject of inquiry before the jury. It admits the original merits to be with the plaintiff, and rests the defence on something that has occurred, or some act that has been done by the defendant since the last continuance of the cause. If it be well pleaded, issue must be taken on it, or there will be a mistrial; if it be bad on its face, the plaintiff must demur; but if good, in point of form, though pleaded out of due time, the proper course is to move to have it set aside. Coverture after suit brought, is a plea in abatement, which never can be pleaded after a plea in bar, unless the matter has arisen since the plea in bar, in which case it may, provided it be done the first opportunity that is presented; for the plea in bar waives only matters in abatement then existing. But the defendant must not suffer a continuance to intervene between the happening and pleading of this new matter; and this is the rule as to all matters arising after issue joined, whether going to the merits or disclosing a personal disability to maintain the suit. But for extrinsic reasons the court may exercise a discretion in receiving such a plea, even after a continuance. Here the plea was neither good in point of form nor pleaded in due time. The marriage is not stated to have

taken place since the last continuance, which is an indispensable averment in every plea of this sort. If a continuance had, in fact, intervened, before it came to the knowledge of the defendant, it would still have been necessary to plead it in this way, but the court to preserve consistency would have permitted him to enter the plea *nunc pro tunc*, an affidavit of the truth of the plea, and the extrinsic matter first being made. Without an allegation of the matter having arisen since the last continuance, there can be no such thing as a plea *puis darrien continuance*; its name imports its nature. It is the only plea that can be put in after a plea in bar; and must be drawn with great certainty. The plea offered was not such, although so intended: it was an ordinary plea in abatement offered at a time when no such a plea could be received, and when the fact it went to controvert had been conclusively admitted by the previous pleadings in the cause. Nor does the Act of Assembly relied on, help the defendant's case. That act merely permits an amendment to be made, or a plea to be added after the jury are sworn. This the liberality of the courts had never refused, at any previous stage of the proceedings. The act permits nothing to be done during the trial, that might not have been done before it commenced. This plea could not have been received before the jury were sworn, and was therefore not within the act.

* * * The plaintiff was not bound to reply, and did not reply; consequently the court did not err in instructing the jury, that the matter contained in this plea formed no part of their inquiry. We are of opinion, the cause was properly tried on the pleas of *non assumpsit* and payment, and that the judgment must be affirmed.

Judgment affirmed.

SADLER v. FISHER'S ADMINISTRATORS.

Supreme Court of Alabama. 1841.

3 Alabama, 200.

[Plaintiff brought an action of assumpsit, to which defendant pleaded seven pleas, the fifth being designated "Payment, *puis darrein continuance*." Plaintiff moved to

strike out all of the pleas except the fifth, on the ground that the rest were waived by this plea.] ³³

COLLIER, C. J.: A plea of matter, arising since the last continuance, as it is technically called, is a waiver of, and substitute for, all former pleas. 6 Dane's Ab. 31; Stephen on Plead. 65; *Kimba v. Huntington*, 10 Wend. Rep. 675; *Yeaton v. Linn*, 5 Peters' Rep. 224; *Wilson v. Hamilton*, 4 Serg't & Rawle's Rep. 238. But there is a distinction as to a ground of defence, which has arisen *after* issue joined, and as to matter arising, pending the suit, but before plea. In the former case, the defendant must plead *puis darrein continuance*; in the latter, he should show that his defence arose, pending the writ, and insist that the plaintiff should not further have or maintain his action, etc. 6 Dane's Ab. 32; *Yeaton v. Linn*, 5 Peter's Rep. 224; *Covell v. Weston*, 20 Johns. Rep. 418.

In the case at bar, the defendant designated his plea, a plea of payment *puis darrein continuance*: we say designated, for it is not drawn out at length; but we know that such was not its character, because there was no issue joined or plea filed when it was pleaded. We may then consider it as an original plea, and pleadable with other pleas in bar, under our statute, which allows a defendant to plead more pleas than one.

In *Covell v. Weston*, 20 Johns. Rep. 414, the defendant pleaded, *non assumpsit*, and a special plea against the further maintenance of the action, of matter arising after suit brought; no objection was made to the joining of the pleas, and the latter plea was held good on demurrer.

* * * * *

33. Condensed statement of facts by the editor.

CITY OF CHICAGO v. BABCOCK.

Supreme Court of Illinois. 1892.

143 Illinois, 358.

[One Guiseppe Le Cardi owned a building at No. 33 West Adams street, in the city of Chicago. There was a trap-door in the sidewalk next to the building, covering a stair-

way leading into the basement, and while this trapdoor was negligently left open plaintiff stepped into the opening and was hurt.] ³⁴

BAKER, J., delivered the opinion of the court.

* * * * *

It appears from the evidence that appellee brought two suits to recover damages for the injuries that she had received—one, the suit at bar, against the appellant city, and the other a suit against Guiseppe LeCardi, owner of the building and premises connected with which were the opening and trapdoor above mentioned, and Ellen Gaynor, tenant of the entire building; that afterwards LeCardi paid to the attorneys of appellee the sum of \$150, and that the larger portion of this was applied, by said attorneys, in paying the costs of the last mentioned suit and other expenses and charges, and some \$30 or \$40 handed to and received by appellee, and that at the time of the payment of the \$150 a writing was executed and delivered to the agent of LeCardi, which read as follows:

“State of Illinois, }
County of Cook. }

“It is hereby agreed that no action shall be begun against Joseph LeCardi, by reason of any matters existing at this date, by the undersigned. Given for good consideration.

EMMA BABCOCK,

by PEASE & WILLIAMS,

Attorneys for Plaintiff.

“Chicago, March 11, 1889.”

It further appears that afterwards an order was entered in the suit of *Babcock v. LeCardi and Gaynor*, showing that on motion of the plaintiff, by her attorney, the suit was dismissed out of court at the costs of the plaintiff.

It is urged by appellant that the dealings of appellee and her attorneys with LeCardi, one of the joint tort-feasors amounted to an accord and satisfaction, and were not only a bar to an action against LeCardi, but also, by operation of law, worked a release of the city from all liability. It appears from the evidence that the transactions with LeCardi and the payment of the \$150 were after this suit was brought and after plea and issue joined thereon,

and a claim is therefore made by appellee, that since appellant did not file a proper plea *pais darrein continuance* it cannot avail itself of the alleged settlement. It is undoubtedly the general rule of the common law that a matter of defense which arises after the commencement of the suit and before plea must be pleaded to the further maintenance of the action, and that a matter of defense which arises after suit brought and also after plea filed, and either before replication or after issue joined, must be pleaded *pais darrein continuance*. (*Mount v. Scholes*, 120 Ill. 394.) But we understand an action on the case to be an exception to this rule. In such an action the defendant is permitted, under the general issue, to give in evidence a release, a former recovery, a satisfaction, or any other matter *ex post facto* which shows that the cause of action has been discharged, or that in equity and conscience the plaintiff ought not to recover. (2 Greenleaf on Evidence, sec. 231.) To this last stated rule, that is applicable to actions on the case, there are, it is true, some exceptions, such as the statute of limitations, justification in an action of slander by alleging the truth of the words, and the retaking, on fresh pursuit, of a prisoner escaped, all of which defenses must be specially pleaded. But, so far as we are advised, it has never been held in an action on the case, that a defense otherwise admissible under the general issue was inadmissible in evidence for the reason it arose after suit brought, and was not specially pleaded either to the further maintenance of the action or *pais darrein continuance*. On the other hand, in *Bird v. Randall*, 3 Burr. 1345, which was an action upon the case, the matter of defense arose after the commencement of the suit, but before it came on to be tried, and it was not pleaded; but the defense was sustained by the Court of King's Bench, and it was held, that as the plaintiff had already received ample satisfaction for the injury done him, he could not afterwards proceed against any other person for a further satisfaction. And Lord MANSFIELD there said: "In such an action as this is (an action of equity, not a formed action *stricti juris*), it is enough if it appears, upon the evidence, that the plaintiff ought not in conscience to recover."

But even if the rule be such as we have indicated, yet it does not affect the result of this litigation. * * *

• • • The pending suit against LeCardi was dismissed, and a written agreement was signed that no action should be begun against LeCardi by appellee. This, on its face, was simply an agreement or covenant not to sue. The legal effect of such a covenant is not the same as that of a release. A covenant not to sue a sole tort-feasor is, to avoid circuity of action, considered in law a discharge, and a bar to an action against such tort-feasor. But the rule is otherwise where there are two or more tort-feasors, and the covenant is with one of them not to sue him. In such case the covenant does not operate as a release of either the covenantee or the other tort-feasors, but the former must resort to his suit for breach of the covenant, and the latter cannot invoke the covenant as a bar to the action against them.

• • • • •

Judgment affirmed.

SECTION 7. COMMENCEMENT AND CONCLUSION OF PLEAS.

CASEY v. CLEVELAND.

Supreme Court of Alabama. 1838.

7 Porter, 445.

ORMOND, J.: To an action on the case on a promissory note, the plaintiff in this court, filed a plea in the following words:

“Micajah B. Casey,

v.

“Cleveland & Stubblefield, use, etc.

“Comes the defendant, Micajah B. Casey, in his proper person, and says that the said Joseph Cleveland and William Stubblefield, who sue to the use, etc., ought not to have and maintain their aforesaid action against him, in manner and form, etc. For this, that he says, at the time of the issuance of the said writ, he was and ever since that time hath been, and yet is a permanent citizen and freeholder of Coosa county, and not subject to be sued in Talladega county; wherefore, he prays judgment,” etc., all of which he is ready to verify.

To this plea, there was a demurrer.

The court sustained the demurrer, and rendered judgment for the plaintiff below. From this judgment, a writ of error is prosecuted to this court.

The subject-matter of this plea would certainly have been sufficient to abate the action, if it had been well pleaded. But according to the well-established rules of pleading, it is not a good plea in abatement. A plea which begins in bar, though it may contain matter in abatement, and conclude properly, will be considered a plea in bar, and final judgment be given on it. (2 Saunders' R. 209, note 1; Littell's Select Cases, 269.)

That is precisely the predicament of this plea. It does not, at the commencement, seek to postpone the action, or give a better writ, but denies the right of the plaintiff to maintain his action. This stamps its character as a plea in bar; and though it afterwards proceeds to set out matter in abatement, it must, by the rules of law, be treated as a plea in bar. The reason of this strictness in regard to pleas in abatement is obvious; it is against the policy of the law to encourage defences which do not go to the merits of the cause, but only serve to promote litigation.

* * * * *

*Let the judgment be affirmed.*³⁵

35. See, on the importance of a proper commencement and conclusion. Pitts Sons' Mfg. Co. v. Commercial Nat. Bank (1887) 121 Ill. 582, given in the text *infra*, ch. VIII.

Stephen states as his eighth rule, under the head of rules which tend to prevent obscurity and confusion in pleading, "Pleadings should have their proper formal commencements and conclusions," and he gives the following forms:

Plea to the jurisdiction. No formal commencement. Conclusion—"he said C D prays judgment of the court of our lord the king here will or ought to have further cognizance of the plea aforesaid."

Plea in suspension. No formal commencement. Conclusion—"the said C D prays that the parol may demur (or that the said plea may stay and be respited) until the full age of him the said C D, [or, as the case may be] etc."

Plea in abatement. No formal commencement. Conclusion—"prays judgment of the said writ and declaration, and that the same be quashed [or as the case may be]."

Plea in bar. Commencement—"says that the said A B ought not to have or maintain his aforesaid action against him, the said C D, because, he says, etc." This formula is called *actio non*.

Conclusion—"prays judgment if the said A B ought to have or maintain his aforesaid action against him." Stephan on Pleading (Tyler's Ed.) 344.

For commencement and conclusion of a plea in estoppel see Webster v. State Mut. F. Ins. Co. (1906) 81 Vt. 75, given *infra* in the text, ch. VII, sec. 2.

DOUGLASS v. CENTRAL LAND COMPANY.

*Supreme Court of Appeals of West Virginia. 1878.**12 West Virginia, 502.*

GREEN, President, delivered the opinion of the court.

* * * * *

The next assignment of error is, "that the plaintiff did not file any replication to the petitioner's plea of payment, which is an affirmative plea." It is not necessary in every case to file a replication to every affirmative plea. Whether a replication be, or be not necessary depends not upon whether the plea be affirmative or negative, but upon whether it concludes to the country or not. As a general rule, an affirmative plea concludes with a verification, because it generally brings forward new facts confessing those stated in the declaration and avoiding them by pleading these new facts; but sometimes it is necessary in order that the pleading may be good, that the pleader should insert in his declaration, or plea, a negative allegation, which, because it is negative, he is not bound upon the trial to prove, but the burden of proving the opposite is upon his opponent. If in any particular case, such a negative allegation is required to make a plea good, such plea should conclude neither to the country nor with a verification; but the replication to such plea though it allege affirmative matter must conclude to the country. For though the facts stated in such replication are affirmative, still they are not new, but are alleged simply in direct denial of the negative allegation required to be stated in the plea. So if a necessary negative allegation is made in the declaration, the plea alleging affirmative matter in direct denial of such necessary allegation should, though an affirmative plea, conclude to the country; though on the trial of the issue the burden of proving it will be in such case on the defendant. Thus in the case of *Brodenham et al. v. Hill*, 7 M. & W. 274, the defendant in an action of *assumpsit* for work and labor, pleaded *non assumpsit* within six years or the statute of limitations omitting the verification, and it was held on a special demurrer, that this plea was good. The court in rendering this decision, said that the plea of the stat-

ute of limitations had by the general practice in modern times been concluded with a verification, but the ancient and better authorities showed that it was entirely unnecessary, and the good sense of the matter was that a party ought not to be required to verify what it does not lie upon him to prove. And in *Wilkes v. Hopkins & Nichols*, 6 M. & G. 36, it was decided in an action of *assumpsit* on a declaration based on the nonperformance of a promise to pay a bill, a plea that the defendant duly paid the bill, should conclude to the country and not with a verification. It is obvious that on the trial of an issue on this plea, the burden of proving payment would be on the defendant, for an affirmative contract to pay money being proven, it is incumbent on the defendant to prove payment. *McGregory v. Prescott*, 5 Cush. 67; and *Van Gieson v. Van Gieson, etc.*, 12 Barb. 520. Nevertheless it was unnecessary and improper to conclude this plea of payment with a verification, for as the declaration had necessarily alleged nonpayment of the bill, the plea which alleged the payment of the bill was a simple traverse or denial of a necessary allegation in the declaration, and should therefore have concluded to the country. And the court so held, and as an illustration of this principle, TINDAL, C. J., in the progress of the case says: "So in an action for a breach of covenant to repair, a plea that the defendant did repair is affirmative, but it concludes to the country." And the reporter in a footnote adds, that a plea that the defendant did not break his covenant concludes to the country.

It is true that if an unnecessary allegation, whether it be affirmative or negative is made in the declaration, a plea denying such unnecessary affirmative allegation, or affirming facts in denial of such unnecessary negative allegation, ought not to conclude to the country. No unnecessary allegation in a declaration whether allegation be positive or negative can be traversed.

Thus in *Goodchild v. Pledge*, 1 M. & W. 362, in an action of debt for goods sold and delivered, the plea alleged that when the debt became due he paid the same, concluding to the country, and the court held upon a special demurrer, that the plea should have concluded with a verification, because it was unnecessary to allege the nonpayment in an action of debt, the allegation of nonpayment in an action of debt being mere form and not traversable, while in an

action of *assumpsit* such allegation is necessary. This distinction we will presently see has not been sustained in Virginia, but the allegation of nonpayment is regarded as necessary both in *assumpsit* and debt. Had they so held, the plea of payment concluding to the country would have been held good in *Goodchild v. Pledge*. In the case of *Ensall v. Smith*, 1 C. M. & R. 522, to a declaration on promises to pay on request, the defendant pleaded he has paid, concluding to the country; a special demurrer was sustained by the court, who held that the plea should have concluded with a verification. The case is distinguished from *Wilkes v. Hopkins & Nichols*, C. M. & G. 4; E. C. L. 36, in this that the plea then was, that the defendant did duly pay the bill when due, which the court held was direct denial of the necessary allegation in the declaration, that the bill was not paid when it fell due. In *Ensall v. Smith*, the plea was, that the defendant has paid the debt, and as it was unnecessary for the declaration to allege more than, that the bill was not paid when due, that the plea amounted to more than the denial of a necessary allegation in the declaration and brought forward new matter, the payment of the debt after it became due, and therefore it should have concluded with a verification. In Virginia as we shall presently see, it is held that an allegation, that a debt was not paid when it became due, would be insufficient to sustain a declaration either in *assumpsit* or debt, but on the other hand, in either of these forms the declaration must allege nonpayment of the debt generally, including its nonpayment at any time after it fell due. Had this been recognized to be the English law, the court in *Ensall v. Smith*, would have held that the general plea of nonpayment ought to have concluded to the country, as then it would have been a direct denial of a necessary allegation in the declaration. * * *

* * * From what we have said it appears that the proper conclusion of a plea of payment must logically depend upon what allegations of nonpayment, if any, were necessary in the declaration. If a general allegation of nonpayment covering not only nonpayment when the debt became due, but also nonpayment since the debt became due must be alleged in the declaration, a general plea of payment which expressly denies this general allegation of nonpayment, must necessarily conclude to the country. But if no allegation of nonpayment need be made, or if the alle-

gation of nonpayment in the declaration may properly be confined to the time when the debt became payable, then the general plea of payment should conclude with a verification, alleging as it would a new fact not necessarily negatived in the declaration. A long train of Virginia decisions has settled beyond controversy that in that State and in this, in an action for the recovery of a debt, whether it be *assumpsit* or debt, the plaintiff in his declaration must not only allege the nonpayment of his debt, but this allegation of nonpayment must be general and not confined to the time when it became due, and must therefore be extended to every person who had a right to receive the payment either at the time it fell due or at any subsequent time. Thus if the suit be on a bond which has been assigned, the allegation must be, that the debt has not been paid to the obligee nor to his assignee. *Braxton's Adm'r v. Lipscomb*, 2 Munf. 282. * * * As an original question the necessity of averring in every form of action in the declaration the nonpayment of a debt either at the time it fell due or at any time subsequently might well have been questioned. But these numerous decisions settle beyond a controversy that in Virginia and in this State, the declaration, whatever be the form of the action, must allege nonpayment of the debt generally; that is so as to include not only when it fell due, but also subsequently. And such being the settled law here we must hold that the general plea of payment denying this necessary general allegation of nonpayment in the declaration must in every case whether the action be *assumpsit*, debt or covenant, conclude to the country.

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CHAPTER VI.

TRAVERSES.

SECTION 1. THE COMMON TRAVERSE.³⁶

STATE v. CAMPBELL.

Supreme Court of Indiana. 1846.

8 Blackford, 138.

A plea cannot traverse what is not alleged in the declaration.

In debt on bond conditioned for the performance of duties, etc., where breaches are not assigned in the declaration, the usual course is for the defendant to set out the condition of the bond on *oyer*, and plead performance generally, and for the plaintiff to assign breaches in the replication.³⁷

36. "*Of traverses*, there are various kinds. The most ordinary kind is that which may be called a *common traverse*. It consists of a *tender of issue*; that is, of a denial, accompanied by a formal offer of the point denied for decision, and the denial that it makes is by way of *express contradiction*, in terms of the allegation traversed. Of this kind examples have already been given in the first chapter. Upon referring to these, it will be found that they are all expressed in the *negative*. That, however, is not invariably the case with a common traverse; for, if opposed to a precedent negative allegation, it will, of course, be in the affirmative, as in the following example [plea alleging that defendant did not promise at any time within six years next before commencement of suit, and traverse in the reply that defendant *did* promise within six years—Ed.]. Stephan on Pleading (Tyler's Ed.) 167.

37. *Converse not universally true.* While it is of course the general rule that a traverse may be taken on any material allegation in the pleading of the opposite party, this is not true where the party making such allegation is not obliged to prove it. Thus, actions of defamation the falsity of the charge is a material allegation, but since it need not be proved (see Bottomly v. Bottomly (1894) 80 Md. 159, given in the text *supra*, chap. IV, sec. 3, (k), (2)) it is the universal rule that a traverse does not put it in issue, and the truth is therefore an affirmative defense which must be specially pleaded. (See Williams v. Miner (1847) 18 Conn. 464, given in the text *supra*, chap. V, sec. 5.)

GILBERT v. PARKER.

*Court of Queen's Bench. 1704.**2 Salkeld, 629.*

In replevin for taking cattle, the defendant made conusance, that A., his master, was seised of the *locus in quo*, and *per ejus praecept* he took them damage feasant. Plaintiff replied, that he was seised of one-third part, and put in his cattle *absque hoc*, that the said A. was sole seised. To this the defendant demurred, and judgment was given against him; for the defendant makes a conusance under his master as sole seised, when he was only tenant in common; in which case he should have pleaded according to the truth, that he was only tenant in common, etc. When the defendant pleads his master was seised in fee of the place *where, etc.*, that must necessarily be understood that he is sole seised; and whatever is necessarily understood, intended, and implied, is traversable as much as if it were expressed; and therefore, though a seisin in fee is only alleged generally, yet that being intended a sole seisin, the plaintiff may traverse, *absque hoc*, that he is sole seised; since the plaintiff makes himself tenant in common with the defendant, it had not been enough to say, that he is tenant in common, without traversing the sole seisin.

MOWER v. BURDICK.*Circuit Court of the United States, Seventh Circuit. 1845.**4 McLean, 7.*

This action is brought upon a sealed instrument, dated the 9th of June, 1839, in which the defendant agreed to indemnify the plaintiffs and save them harmless against the payment of a certain promissory note, made and signed by the plaintiffs jointly and severally, with one Samuel Mower, then of Michigan City, Indiana, for the sum of seventeen hundred dollars, payable in one year, for the

benefit and use of the said Samuel Mower. And the plaintiffs aver, that on the 12th day of July, 1842, they paid the said note. The second count in the declaration was substantially the same on another note.

The defendant pleaded that the said Samuel Mower did himself take up and pay each of the said several promissory notes when they became due. * * *

This plea is bad. The plaintiffs aver that they paid the notes after they became due; the plea alleges that Mower paid them when they became due, which is not a direct answer to the averment in the declaration. This may be a good argument to show that the plaintiffs could not have paid the notes as they allege, but it is an argumentative denial of the fact stated in the declaration, which should be traversed. Stephen Pl. 385, 175-6-7, 181.³⁸

38. "An apt issue is not formed without an affirmative and a negative." *Fortescue v. Holt* (1672) 1 Ventris, 213.

"When, in the course of pleading, they come to a point which is affirmed on one side and denied on the other, they are then said to be at issue." 3 Bl. Com. 313.

"Issue (*exitus*) a single, certain, and material point, issuing out of the allegations or pleas of the plaintiff and defendant, consisting regularly upon an affirmative and negative, to be tried by twelve men." Coke on Littleton, 126, a.

HARRIS v. FRASER.

Court of Queen's Bench. 1854.

12 Upper Canada Queen's Bench, 402.

CASE.—The first count of the declaration set out that the plaintiff was possessed of a sawmill and premises in the township of Brantford, and enjoyed the benefit and advantage of a certain stream or watercourse, which ought, and, until the committing of the grievances by the defendant as hereinafter mentioned, did run and flow from a certain creek called the Whiteman's Creek, above the said mill, to the said mill, and thence to the said Whiteman's Creek below the said mill whereby the waterwheel of the said mill was worked, without being flowed back or dammed back upon the said mill, or the wheel or apron thereof; yet the defendant, well knowing, etc., but contriving, etc., wrong-

fully and injuriously erected a dam in and across the said creek below the plaintiff's said mill, and wrongfully and injuriously kept and continued the said dam so erected in and across the said creek, for a long time, to wit from thence hitherto, and thereby, during all the time aforesaid, wrongfully and injuriously obstructed and diverted the usual and proper course and natural flow of the water of the said creek, whereby the water of the said creek ran and flowed out of its usual course, and became and was dammed and penned back upon the said mill of the plaintiff, and the said wheel and apron thereof; and the plaintiff, by reason of the said water being so dammed and penned back was deprived of the use of his said mill.

The defendant pleaded * * * that one Michael Force, for a long time before the said mill of the said plaintiff was erected, and before the digging and making the trench or mill race by the plaintiff as hereinafter mentioned, and before the committing the alleged grievances above in this plea mentioned, and before and at the time of making the deed hereinafter next mentioned, to wit, on the 15th of March, 1848, was, and still is the owner and occupier of the land, sides, and banks on each side of the said creek, and through and over which the said creek then ran and flowed, and still ought to run and flow, at the place where the said stream or watercourse in the said first count mentioned runs to and into the said creek, below the mill of the said plaintiff; and then owned and occupied, and still owns and occupies, the land on each side of the said creek, and over which the same runs for a long distance above the said last mentioned place, to wit, forty rods above; and also then owned and occupied, and still owns and occupies, the land from the said last mentioned place, on each side of the said creek, and over which the said creek runs, to the close and premises of the said defendant as hereinafter mentioned; and that the said Michael Force, on the day and year last aforesaid, by a deed under his hand and seal, gave and granted unto Henry Cope and Greaves Robson, who were then the occupiers of the close and premises of the defendant hereinafter mentioned, and their assigns, the easement, right, and privilege of obstructing the natural flow of the water of the said creek, and of raising and damming the same back in and upon his said close and land, at all times when they should require so to do (making

profert of the deed), of all which premises the said plaintiff then had notice, * * * that afterwards, and before the committing of the said supposed grievances in the introductory part of this plea mentioned, to wit, on the said first day of March, 1853, he, the said defendant, became and was lawfully possessed of a certain gristmill and premises situate upon the said creek, just below and adjoining the said land and close of the said Michael Force; and that it then became necessary, for the purpose of properly driving and working the last mentioned mill, to build, and erect, and maintain, and continue a dam upon and across the said creek, whereby to raise the water and obtain a sufficient head of water for the purpose aforesaid; and that the said defendant did then, for such purpose, with the consent of the said Michael Force, erect, maintain and continue the dam in, upon, and across the said stream, upon the premises so in the possession of the defendant as aforesaid * * * so that a small quantity of the water of the said creek, raised and dammed back for the purpose aforesaid, ran and flowed out of its usual course and channel, through the said trench or raceway leading from the said mill of the plaintiff to the said creek, through the said close of the said Michael Force, upon the said mill of the said plaintiff, and the wheel and apron thereof. * * *

Demurrer.—The causes assigned sufficiently appear in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

We think this plea is bad, not exactly as amounting to the general issue, because “not guilty” in an action of this kind only puts in issue the doing the act complained of; but as being an argumentative traverse of the plaintiff’s alleged right to have the water flow along the raceway unobstructed from his mill into the river lower down.

* * * * *

The declaration does not, in terms as precise as are generally used, aver the plaintiff’s right to have the water flow unobstructed down the raceway. It says only, that it *ought* to have so run and flowed. But we may give such force to that expression as is necessary for supporting the action, and must take it to be intended as a positive assertion of a right. It follows then, if it is sufficiently averred to answer the plaintiff’s purpose, that it may be traversed by the defendant for in truth it lies at the very foundation of the

plaintiff's action. Then in this plea, instead of simply traversing the alleged right to the uninterrupted flow of water through the raceway, the defendant sets up certain facts tending to show that the plaintiff could have no such right, and does not conclude with a special traverse of the right.

The obstruction complained of is the erecting of a dam across Whiteman's Creek, below the plaintiff's mill and thereby obstructing the flow of the water of the creek whereby *the water of the creek*—that is, of Whiteman's Creek—flowed out of its course, and was “dammed back upon the mill of the plaintiff, and upon the wheel apron thereof.”

The plaintiff does not in express words tell us that the water was backed up the race to his mill, but his declaration shows that it must have been so, if his mill wheel was obstructed. All therefore depends upon the plaintiff's right to have the water of the stream or raceway run from his mill unobstructed into Whiteman's Creek, for if the plaintiff had not a right to have the water run into the creek by the raceway as freely as it was running when the defendant put up his dam, then no wrong has been done him.

The facts as they were pleaded, would, it appears to us, constitute a defence if substantiated in evidence, and if they had been well pleaded unless they could be repelled by new matter shewn by the plaintiff; but nothing turns upon this demurrer beyond the cost of the pleading, for there was upon the record another plea, simply traversing the plaintiff's right to the flow of water through the raceway. But the plaintiff, it seems, succeeded upon that issue upon the trial. He has gone to the jury upon the same defence, which the defendant desired to set up in this plea.

Judgment for the plaintiff on demurrer.

SMITH v. THOMAS.

Court of Common Pleas. 1835.

2 Bingham's New Cases, 372.

[Plaintiff brought an action of slander, alleging that he was a draper and haberdasher, and that the defendant had

falsely stated to divers persons that plaintiff had been in embarrassed financial circumstances and was unfit to be credited in the way of his said trade, by reason whereof plaintiff was specially damaged through the refusal of several persons, *nominatim*, to deal with him. Defendant, in his third plea, denied the existence of the special damage alleged, and to this plea plaintiff demurred.] ³⁹

TINDAL, C. J.: The argument in this case has turned principally on the special demurrer to the second plea. For as to the third plea, which is pleaded, not to the action, but to the special damage only, we held it to be insufficient as the argument was proceeding before us. The allegation of special damage in a declaration of slander is intended only as notice to the defendant, in order to prevent his being taken by surprise at the trial. Where the words are actionable in themselves, it is not the gist of the action, but a consequence only of the right of action. If the plaintiff proves his special damage, he may recover it; if he fails in proving it, he may still resort to, and recover, his general damages. A traverse, therefore, of such an allegation is immaterial and improper, as a finding upon it either way will have no effect as to the right to the verdict.

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39. Condensed statement of facts by the editor.

LAWSON v. STATE.

Supreme Court of Arkansas. 1843.

9 Arkansas, 9.

OLDHAM, J.: The objections taken to the replications are frivolous, and can be sustained only by a total misconception and a misapplication of the plain rules of pleading. It is true, as is contended for by the plaintiffs in error, that every plea must answer the whole count, and every replication must answer the whole plea; but, to do this, it is not necessary that every material allegation in the opponent's pleading should be traversed. A party may traverse any material allegation. 1 Ch. Pl. 644. For if such averment be necessary to support the plaintiff's action, or the

defendant's defence, the plea or replication denying it is an answer to the whole count or plea. In this case each allegation denied by the replication is material and unless sustained by proof, if denied, the defendants below would not have been entitled to a verdict. The circuit court did not err in overruling the demurrer.

Affirmed.

BRIDGWATER v. BYTHWAY.

Court of Common Pleas. 1683.

3 Levinz, 113.

Battery; defendant pleads a judgment obtained by his father against Elias Jones, and an execution thereupon, whereon the goods of Jones were taken in execution, and that the plaintiff assaulted the bailiffs, and would have rescued the goods; whereupon in aid of the bailiffs, and by their command, the defendant *molliter manus imposuit* upon the plaintiff to prevent his rescue of the goods. The plaintiff replied, *de injuria sua propria absque hoc* that the defendant by command of the bailiffs and in aid of them, to prevent a rescue of the goods, etc. Whereupon the defendant demurred generally, and upon argument it was resolved by the whole court: 1. That the replication in traversing the command of the bailiffs was not good. *For he might of himself do that, to prevent the rescue, which is a tort and a breach of the peace.*

SIR RALPH BOVY'S CASE.

Court of King's Bench. 1672.

1 Ventris, 217.

In debt upon an escape, the plaintiff sets forth in his declaration a voluntary escape.

The defendant protesting that he did not let him voluntarily escape, pleads, that he took him upon fresh pursuit.

To which it was demurred, because he did not traverse the voluntary escape; and resolved for the defendant: for it is impertinent for the plaintiff to allege it, and no ways necessary to his action. 'Tis out of time to set it forth in the declaration; but it should have come in the replication. 'Tis like leaping (as HALE, Chief Justice, said) before one come to the stile; as in debt upon a bond the plaintiff should declare, that at the time of sealing and delivery of the bond the defendant was of full age; and the defendant should plead deins age, without traversing the plaintiff's allegation. *Whiting and Sir G. Reynell's case* 657 in 2 Cro. seems to be against it; but *Harvey and Sir G. Reynell's*, 2 Car. in Latch, is resolved, that no traverse is to be taken.

LUSH v. RUSSELL.

Court of Exchequer. 1850.

5 Exchequer, 203.

PARKE, B.: In this case, which was tried before my Brother CRESSWELL, at Bristol, a rule *nisi* was granted on the ground of misdirection, and cause shown at the late sittings after term.

It was an action brought by the plaintiff, a servant, for dismissing him during the period for which he was hired, viz., four years; and the plaintiff in his declaration alleged that the defendant refused to permit the plaintiff to continue in his service during the term, and wrongfully dismissed him therefrom without any reasonable cause.

The defendant pleaded, that, after the making of the agreement, and before the discharge and dismissal, the plaintiff conducted himself in an improper and disobedient manner, and disobeyed the defendant's lawful orders; without this, that the defendant wrongfully dismissed and discharged the plaintiff without reasonable cause, and concluded to the country.

On the trial, the defendant having admitted the dismissal, proposed to show that the plaintiff had misconducted himself so as to justify the discharge; but the learned judge refused to receive the evidence, and directed a verdict for

the plaintiff, being of opinion that the plea put in issue the dismissal only. We are to decide whether that direction was right, and we are of the opinion that it was not. The question is not, whether the plea would have been bad on demurrer, for putting in issue an immaterial allegation, but how the issue raised was to be disposed of at the trial.

There is no doubt that the plaintiff might have omitted the allegation that the defendant dismissed him "without reasonable cause," and that the averment of his having done so, was, in the declaration, immaterial and surplusage, and ought not to have been put in issue; and that the plea, in form at least, throws the burden of the proof of the want of reasonable cause on the plaintiff, which the defendant, on proper pleadings, ought to have borne; and on these grounds, the plea is clearly demurrable; but, it not having been demurred to, the matters which it does put in issue, though immaterial in that stage, and improperly put in issue, must be disposed of by the jury, under the direction of the judge. For example, if the plea were to put in issue matter of aggravation unnecessarily stated, and only that—as the conversion of goods in an action of trespass for taking them, the death of cattle in the same form of action for driving them—though the plea would be unquestionably bad, the verdict must be taken one way or the other upon the issue on the trial. In like manner, it must, if the plea put in issue that *and another* and material fact, the only question being, *whether it is put in issue*. Now, it is certain that if the form of the traverse is such that the material may be separated from the immaterial averments, the material need only be proved on the trial. Such is the case where there is a plea which is a general denial only, as not guilty in trespass, or case, where immaterial matter or matter in aggravation was stated; such would be the case in *non assumpsit*, under the old system, on such a declaration as the present; and such would have been the case if the defendant had traversed the allegation of dismissal in the general form, "that he did not dismiss the plaintiff, *modo ac forma*;" then the dismissal only, the material part would have been in issue.

* * * * *

* * * But if the traverse, instead of being in a general form, puts in issue the immaterial part in express terms, that must be disposed of by the jury, and, generally

speaking, according to the terms of the issue. The objection to such a plea on demurrer is, that if issue were taken on it, it would oblige the plaintiff to prove what but for the form of the issue he need not have proved. This is the general character of the objection that a traverse is too large—see the case of *Gorham v. Sweeting*, 2 Wms. Saund. 207a, n. 24, 6th edit., where it is very correctly said in the note of the learned editor, “It shall not be permitted to a defendant, by expressly traversing any allegation in the declaration by a formal traverse, to compel the plaintiff to prove more than he would be bound to do if the defendant had pleaded the general issue only to the declaration.”

Now, there cannot be any doubt that this form of a traverse does in express terms deny the want of reasonable cause; and therefore, that question must be disposed of by the jury. Whether it throws the burden of proof on the wrong party is immaterial in the present inquiry; if it does, it is an additional reason for demurring to it; but it nevertheless puts in issue the want of reasonable cause, however informally. We think, however, that on the trial of the issue the *onus probandi* would be on the defendant, on the ground that he had the affirmative of the proposition to maintain, and that the defendant ought to justify the act of dismissal, which is *prima facie* a breach of covenant.

Upon reference to the authorities and cases cited on the argument, there is none that is at variance with the rule, that if the traverse be general in its terms, it does not involve matter which need not have been pleaded, and that, if it is special, denying the matter expressly, it does, except the case of *Powell v. Bradbury* (18 L. J.), on the authority of which, no doubt the learned judge proceeded.

In the present case there is an inducement which leaves no doubt as to the intention of the pleader in the traverse; which there was not in that; but we do not think we ought to rely upon that distinction.

We cannot ascertain, from the short report of the case of *Powell v. Bradbury*, in the Law Journal, whether the question of what was in issue on such a traverse, on which the opinion of the court appears to have been declared, was material to the decision of the case, or extrajudicial; in the report of the same case in 7 Com. Bench Reports, p. 201, just published, it does. Be this as it may, it does dis-

tinctly appear that the opinion was founded on the authority of the case of *Frankum v. The Earl of Falmouth*, 2 A. & E. 452, which we think inapplicable, as the question there arose on the issue on a plea of not guilty, and it was rightly held, that although there was an averment in the declaration, that the defendant wrongfully diverted a watercourse, the wrongful nature of the act was not in issue. It was not the case of an express traverse. Matter of aggravation would not have been in issue on not guilty, and yet, if expressly put in issue, it must have been proved. So unnecessary matter, as an averment of the defendant being of full age when he executed a bond, if the plea had stated (admitting the execution of the bond) that he was not then of full age, that question would have been in issue, and equally so if the issue was such (whether informal or not, in that respect, is of no consequence) as to put both facts, the execution of the bond and the majority, in issue.

The case of *Palmer v. Gooden*, 8 M. & W., 890, which was the other case cited for the plaintiff, does not decide the question as to what should be proved on an issue involving immaterial matter of the description which this does. A satisfactory reason for that judgment is, that a traverse is not bad which involves what is not merely immaterial but impossible, and therefore incapable of being proved at all, as a traverse of an entry on and an expulsion from an incorporeal hereditament, viz., tolls. Lord Chief Justice TINDAL says, indeed, that an issue upon the substantial matter to be tried by the jury, is not bad merely because it includes in it something of total surplusage and immateriality. But that is not the case here; for the allegation of the want of reasonable cause need not have been made by the plaintiff, and is surplusage in that sense; yet, being expressly, though informally, put in issue, it is not totally immaterial, but the contrary.⁴⁰

* * * * *

40. In *Rowcliffe v. Murray* (1842) 1 Car. & Marshm. 513, where the declaration in trespass alleged that the acts were done without reasonable or probable cause, it was held that under the general issue it might be shown only in mitigation of damages that there was reasonable and probable cause. *Accord.* *Russell v. Shuster* (1844) 8 W. & S. (Pa.) 308.

GORAM v. SWEETING.

*Court of King's Bench. 1670.**2 Saunders, 205.*

Assumpsit on a policy of assurance by Goram, plaintiff, against Sweeting, defendant. The plaintiff declares that he had caused a policy of assurance to be written on the good ship called the *Margaret* of London, and on the tackle and apparel, etc., of the same ship, in which policy it was contained, that if any misfortune should happen to the ship in the voyage, it should be lawful for the plaintiff to sue and labour for the defence and safety of the ship, without any prejudice to the policy, and that the assurers, of whom the defendant was one, would contribute to the charges thereof according to the several sums respectively insured by them. And the plaintiff further shows, that the defendant became an assurer on the said policy for 50*l.*, and in consideration of the plaintiff's promise to pay him at the rate of 3*l.* 12*s.* per cent. for six months, undertook and promised to perform the said policy as to 50*l.* so insured by him. And the plaintiff avers in fact, that the ship, etc., did not arrive in safety, but "that the said ship, tackle, apparel, ordnance, munition, artillery, boat and other furniture were sunk and destroyed in the said voyage," of which the plaintiff gave the defendant notice, and abandoned all his interest therein, yet the said defendant has not borne the adventure, nor paid the said 50*l.*, wherefore the plaintiff brings this action.

The defendant pleads in bar that the ship and all the apparel and tackle aforesaid arrived in good safety, and traverses without this, that "the said ship, tackle, apparel, ordnance, munition, artillery, boat and other furniture were sunk and destroyed in the said voyage in manner and form as, etc.," and this, etc., wherefore, etc., upon which plea the plaintiff demurs in law.

And *Jones* for the plaintiff argued that the traverse in the defendant's plea was bad, because the defendant has traversed in the conjunctive, namely, without this that the said ship and tackle, etc., were sunk and destroyed, whereas it ought to be in the disjunctive, namely, without this

that the said ship or tackle, etc., were sunk and destroyed. For, as he said, if in this case any of the things enumerated arrive in safety, as, for instance, if the ship arrive in safety, although all the goods and merchandizes, and all the apparel and tackle of the ship, for which by the policy a satisfaction ought to be made to the plaintiff are lost, yet if issue had been taken on the defendant's traverse as it now is, it would be found against the plaintiff; and this action being only for damages according to the loss which the plaintiff has sustained, every part ought to be put in issue. For perhaps the ship arrived in safety, and yet the other things, as guns and anchors, and all the goods and merchandizes are lost, which ought to be put in issue by themselves; so that the plaintiff may have a verdict for the loss of them, and his damages assessed according to the proportion of them, and the defendant may be acquitted of the residue. But now unless the plaintiff prove that the ship and all the other things are lost, he shall not recover for any part. And if the defendant prove that only a cable or anchor arrived in safety, he would be acquitted of the whole, if the plaintiff had taken issue on this traverse. Wherefore he concluded that the traverse was bad, and prayed judgment for the plaintiff.

Coleman and *Saunders* for the defendant argued, that the traverse was good. * * *

But notwithstanding this, it was adjudged for the plaintiff, because, as *Twysden* declared, it was only an action for damages, and the defendant might aid himself on the writ of inquiry; and if he had traversed in the disjunctive, and issue had been joined upon it, the defendant might give in evidence any such matter in mitigation of damages.
* * *

TROOP v. THE UNION INSURANCE COMPANY.

Supreme Court of New Brunswick. 1893.

32 New Brunswick, 135.

TUCK, J.: * * *

The declaration contains two counts. The first count alleges that one Willeby O. Cobert, at the time of the issuing

of the policy, was interested in and possessed of a vessel called the "*H. A. DeWitt*;" that the plaintiffs caused Cobert's interest in the vessel to be insured by the defendants, loss to be paid to the plaintiffs, in consideration of the premium paid to them by the plaintiffs; and that at the time of the making of the policy, and from then until and at the time of the loss, Cobert was interested in the vessel to the amount of all the moneys insured thereon; and that the insurance was for the benefit of Cobert; and then avers that the vessel, while so insured, was wholly lost by the perils insured against, and that all conditions were fulfilled, etc., to entitle the plaintiffs to be paid. * * *

* * * * *

The second and seventeenth pleas to the first and second counts, respectively, are the same, and are as follows: "And for a second plea to the said first count the said defendant company says, that the said Willeby O. Cobert was not at the time of the making of the said policy of insurance, and from thence until and at the time of the loss in the said count mentioned, interested in the said schooner or vessel, and premises to the amount of all the moneys insured thereon."

The plea given in Bullen & Leake, 611, denying interest, is, that the said plaintiff was not interested in the said ship and premises as alleged. But the defendant company is apparently not satisfied with that form of plea, and makes its traverse larger by alleging that Cobert, at the time of the making of the policy and at the time of the loss, was not interested in the vessel to the amount of all the moneys insured thereon. I think this denial is too large, for Cobert may have been interested in part of the moneys insured, for which part, under the allegations in the first count, he would have been entitled to recover. The plea should have alleged that Cobert was not interested in all the moneys, nor in any part thereof.

* * * * *

ALDIS v. MASON.

*Court of Common Pleas. 1851.**11 Common Bench, 132.*

[Action of covenant, the declaration alleging the making of a certain indenture whereby the plaintiffs leased two certain messuages to the defendant, and wherein the defendant covenanted to keep the said premises in repair at his own expense during the entire terms of 21 years, and 18 years wanting ten days, respectively. And the breaches alleged were that the defendant did not keep the premises in repair during the said terms but during all the said terms suffered them to be and continue ruinous, prostrate, etc.] ⁴¹

Plea to the first breach, that the defendant did not, during the said term of twenty-one years by the said indenture created, suffer or permit the said premises so demised for the term last aforesaid, or any part thereof, to be or continue, nor were the same, *for or during all the said time*, ruinous, prostrate, fallen down, etc., for want of needful or proper reparations, etc., concluding to the country.

To the second breach, that the defendant did not during the said last-mentioned term of eighteen years, wanting ten days, by the said indenture created, suffer or permit the said premises so demised as last aforesaid, or any part thereof, to be or continue, nor were the same, *for or during all the said time*, ruinous, prostrate, etc., concluding to the country.

To each of these pleas, the plaintiffs demurred specially, assigning for causes—that the traverse and denial contained in the said plea are too large, and are informal; that the traverse and denial purport and attempt to put in issue the length of time during which the premises were so ruinous as in the breach alleged, and to compel the plaintiffs to prove a breach of covenant extending over all the time in the breach mentioned; and that the plea ought to be in the affirmative, and ought to follow the words and meaning of the covenant of the defendant in that behalf, and is bad and objectionable on account of traversing and deny-

41. Condensed statement of facts by the editor.

ing that the premises, or any part thereof, were ruinous, prostrate, fallen down, foul, miry, choked up, in great decay, or in bad or untenable repair or condition, as therein purported or attempted to be done, etc. Joinder in demurrer.

Willes, in support of the demurrer. The pleas are bad, for attempting to put in issue the length of time over which the breaches alleged in the declaration extended. The defendant should have pleaded performance. It is no plea, to say that the premises were not out of repair during *all the time* alleged in the declaration; for, the plaintiff would have a right of action, if the premises were permitted to be out of repair during any *part* of the term. The pleas are calculated to perplex and embarrass the plaintiff.

Piggott, contra. The pleas are good. * * *

JERVIS, C. J. The court is of opinion that the pleas are bad, for the reasons already stated.

AUBERY v. JAMES.

Court of King's Bench. 1670.

1 Ventris, 70.

Assault, battery and wounding: the defendant insisted, for that he being master of a ship, commanded the plaintiff to do some service in the ship, which he refusing to do, he *moderate castigavit* the plaintiff, *prout ei bene licuit*.

The plaintiff maintains his declaration *absque hoc quod moderate castigavit*, and issue was taken thereupon.

After verdict for the plaintiff, it was moved in arrest of judgment, that the issue was not well joined; for *non moderate castigavit* doth not necessarily imply that he did beat him at all, and so no direct traverse to the defendant's justification, which *immoderate castigavit* would have been: but, *de injuria sua propria absque aliqua tali causa* would have been the most formal replication.

But the justices held, that it would serve as it was after a verdict, tho' the statute at Oxford, 16 Car. 2, the last and most aiding Act of Jeofails be expired, and that *de injuria sua propria*, not adding *absque aliqua tali causa*, hath been held good after a verdict.

**KIMBALL v. BOSTON, CONCORD & MONTREAL
RAILROAD COMPANY.***Supreme Court of Vermont. 1882.**55 Vermont, 95.*

[The plaintiff alleged in his declaration that the defendant "received the plaintiff into one of its passenger cars to be by it safely and securely transported and conveyed over its said road for a certain hire and reward paid to the defendant and in consideration of the plaintiff's sending large amounts of freight over the defendant's said road, for which it received pay," etc.; and that the plaintiff was injured though the negligence of the defendant. The defendant pleaded the general issue and two special pleas in bar. The second plea alleged that the plaintiff was being carried over defendant's railroad without charge and free of expense, and in consideration thereof plaintiff agreed to assume all risk of accident and not to hold defendant liable for any injury to his person or his goods while being so carried over said railroad, concluding with a verification. The third plea alleged that the plaintiff applied for and received from defendant a free ticket to pass him over defendant's railroad, which ticket was in words and figures as follows: "This ticket will pass Mr. O. Kimball, Concord to Marshfield, without charge; he, in consideration thereof, assuming all risk of accident, and agreeing that the corporation shall not be liable under any circumstances, for any injury to his person, or loss or injury to his goods, while using this ticket. Not good unless used within three days from date.

"(Issued by B. L. & N. R. R.) B. F. Kendrick;" and that plaintiff used this ticket at the time of the injury alleged, concluding with a verification.

Demurrer to the second and third pleas.] ⁴²

ROWELL, J.: The second and third pleas are attempted to be sustained on the ground that they are special issues. Instead of pleading the general issue, the defendant may, in some cases, effectually answer the declaration by a special issue, i. e., by directly denying some one material and

42. Condensed statement of facts by the editor.

traversable allegation in the declaration, and concluding to the country. Gould Pl., c. 6, s. 60. But such a plea never advances new matter, but merely denies some particular material and traversable allegation, the denial of which is, in effect, a denial of the entire right of action. Gould Pl., c. 2, s. 38. In England, such pleas were allowed as matter of convenience for the sake of confining the evidence to one single point, so that if the jury on that point gave a corrupt verdict, they might be more easily attainted than they could have been on the general issue, where the matter was more complicated. Issues of this sort were formerly not uncommon there; but they fell into disuse except in feigned issues, where they were, and perhaps now are, uniformly adopted, the pleas in those cases always being drawn with express admissions of all the facts stated in the declaration, except the particular fact that the issue was intended to try. Lawes Pl. (523). See forms of such pleas in 2 Chit. Pl. (239), and 1 Wentw. 120 to 140. Such pleas are to the particular allegation that they deny what the general issue is to the whole declaration. And they effectually deny the whole declaration; for when each of several concurring facts is necessary to one entire cause of action, the denial of any of them is a denial of the whole cause of action.

But when the defence consists of matter of fact merely in denial of such allegations in the declaration as the plaintiff would on the general issue be bound to prove in support of his case, a special plea in bar is bad as amounting to the general issue. 1 Chit. Pl. 527; Steph. Pl. 418, Rule II. Such is the character of these pleas. The declaration alleges a consideration for carrying the plaintiff. On trial on the general issue, the plaintiff would be bound to prove this allegation as one of the essential elements of recovery, for such has he made his case by the declaration. The pleas, in an indirect way, deny this allegation by advancing new matter, showing a contract contradictory to that stated in the declaration, and conclude with a verification. They have no semblance to special issues, either in form or substance. They allege new matter, they contain no direct denial, they do not conclude to the country. Viewed as traverses, they tend to unnecessary prolixity, and are an argumentative denial and a departure from the prescribed form of pleading the general issue.

There is a great distinction between the case of a plea that amounts to the general issue and a plea that discloses matter that may be given in evidence under the general issue. In *Carr v. Hinchliff*, 4 B. & C. 547, a defence was put upon the record that, it was admitted, might have been gone into under the general issue and yet the plea held good. It is there said that there are instances in which a defendant has the option of giving his defence in evidence under the general issue or of putting it on the record. And those instances are said to be—1st, where the right of action is confessed and avoided by matter *ex post facto*, e. g., by a plea of payment, accord and satisfaction, and the like; and 2d, where the plea does not deny the declaration, but answers it by matter of law, as, in *Jussey v. Jacobs*, 1 Ld. Raym. 87, which was an action against the acceptor of a bill of exchange, the defendant pleaded that it was given for money lost at play, and therefore void under the 16 Car. 2, c. 7. See, also, *Maggs v. Ames*, 4 Bing. 470. In *Hayselden v. Staff*, 5 A. & E. 153, a plea setting up a different contract from the one declared on, was held ill as amounting to the general issue. In this case Lord DENMAN said, that “what, in correct language, may be said to amount to the general issue is, that for some reason specially stated, the contract does not exist in the form in which it is alleged; and when that is the case, it is an argumentative denial of the contract instead of being a direct denial, and, which, according to the correct rules of pleading, is not allowable.” In *Morgan v. Pebrer*, 3 Bing. N. C. 357, a plea setting up a contract incompatible with the one declared upon was held ill as amounting to the general issue. In *Lyall v. Higgins*, 4 Q. B. 528, a plea alleging a different consideration from that stated in the declaration was held bad for the same reason. PATTERSON, J., said, “It is now settled that the proper mode of traversing a consideration is by a plea of *non assumpsit*.” In *Potter v. Stanley*, 1 D. Chip. 243, a special plea in bar that the note declared upon was given without consideration was adjudged to amount to the general issue.

We are of opinion, therefore, that the pleas now before us cannot be sustained in form. As to the proper manner of taking advantage of a defect of this kind, we express no opinion further than to say, that by joining in demurrer the defendant waived whatever right it might otherwise

have had to appeal to the discretion of the court, and the question may be decided on demurrer. Gould Pl., c. 6, s. 88.

Judgment affirmed and cause remanded, with leave to the defendant to replead on the usual terms.

SECTION 2. THE SPECIAL TRAVERSE.

STATE v. CHRISMAN.

Supreme Court of Indiana. 1850.

2 Indiana, 126.

PERKINS, J.: Debt upon an administrator's bond against him and his sureties. The plaintiff is the State upon the relation of Barrell and Hannah. The defendants are John Chrisman, John H. Nelson, Simon Emmert, Samuel Miller, David Bush, William D. Porter, Caleb Osborn and John Porter. The date of the bond is alleged to be the 29th of September, 1838. John Chrisman is the administrator, and upon the estate of John Galvin, deceased. The condition of the bond is stated in the declaration; and, according to that statement, is in the usual form of an administrator's bond. The declaration alleges that in April, 1840, Barrell and Hannah obtained a judgment against Chrisman, as administrator, upon a debt due from Galvin, and that an execution upon it was returned, no goods, etc., of the deceased Galvin's estate. It then assigns four breaches of the condition of the bond by Chrisman. The first is that he had received a large amount of the effects of Galvin, with which he should have paid such judgment, but that he had wasted them, etc. The other breaches need not be stated. The defendants pleaded separately, and filed, in the aggregate, fifty-one pleas. The case went off upon demurrer in favor of the defendants; and we shall find it necessary to state but one of the pleas in determining upon the correctness of the decision below.

The eighth plea of William D. Porter was as follows: "The said defendant says *actio non*, because he says that the said John Chrisman, on the 29th of September, 1838,

in the vacation of the Boone Probate Court, took out special letters of administration on the estate of one John Galvin, deceased; and the supposed writing obligatory in the plaintiff's declaration set forth was the supposed bond of the said John Chrisman, and the other defendants herein, for the faithful discharge of his duties as such administrator; and the said Boone Probate Court, at its session next ensuing the date of said bond, did not confirm the said special letters of administration, nor continue said bond. And the said defendant avers that from the 29th of September, 1838, until the end of the next session of the said probate court thereafter ensuing, the said John Chrisman was not guilty of any of the said supposed breaches of the condition of said bond. *Without this*, that the said John Chrisman was the administrator of the goods, chattels, rights, etc., of the estate of the said John Galvin, deceased, at any time after the end of the session of the Boone Probate Court next succeeding the said 29th of September, 1838; and this," etc.

To this plea the plaintiff replied, giving a minute history of Chrisman's vacation appointment, and averred "that the said John Chrisman, under and by virtue of said appointment, took upon himself the burthen of said administration, and possessed himself of the goods, etc., of said estate, and proceeded to make an inventory, etc., thereof (the said John Porter assisting, etc.); and afterwards, and before the term of the said probate court next ensuing his said appointment, said Chrisman caused said inventory, etc., to be filed in the office of said clerk of said probate court; and at the term of said court next ensuing said appointment of Chrisman, to wit, at the November term, 1838, said court (whereof Samuel McLean continued to be judge, and who, as such, in vacation, approved said Chrisman's said bond), made no order of record in relation to said appointment and said bond; nor did the said court, at said November term, 1838, or at any other term, ever recall or set aside the appointment of said Chrisman, or disapprove of said bond, or appoint any other administrator of said estate, or make any other appointment of said Chrisman, as such administrator; nor was any other or different administration of said estate ever granted than said appointment of said Chrisman as aforesaid made; nor was any other security ever given by or on behalf of said Chrisman

in the premises than the bond aforesaid; and said plaintiff further avers that, by virtue of said vacation appointment, Chrisman continued to act as administrator for many years after said November term, 1838, and made reports of his doings as such to said probate court, which said court received and acted upon, and further dealt with and treated said Chrisman as administrator as aforesaid, under and by virtue of his said vacation appointment, and after the said November term, 1838; and while said Chrisman so continued to act as such administrator, under his said appointment, he, the said Chrisman, committed the grievances, etc., complained of, etc., which the plaintiff is ready," etc.

To this replication a demurrer was sustained, and final judgment given for the defendants.

The replication was to several pleas, all similar to the one we have set out; and what we shall say will apply to all of said pleas.

The plea in question was drawn with an eye to the following provisions of the R. S. of 1838, p. 178, s. 18:

"When any person shall die intestate in the vacation of said court (probate court), and his or her estate is in such condition as to require the immediate care of some person of competent integrity and ability, it shall be lawful for the clerk of such court, in the county in which, by the conditions of this act, administration shall be granted, to grant some such person special letters of administration on the estate of the said deceased, until the next ensuing session of said court." "Provided, that such court, at its next ensuing session after the granting of such special letters of administration, at its discretion, may confirm or revoke the same; and if such court shall confirm the granting of said letters, it may, at its discretion, either continue the bond taken as aforesaid by said clerk, or require such administrator to renew said bond, conditioned as aforesaid; and if such court shall revoke such letters, it shall proceed to grant general letters of administration to such person or persons as are or may be legally entitled to the same."

The plea is what is called a special traverse, and its inducement must be, in substance, a sufficient answer to the declaration, though not a direct denial, nor yet a confession and avoidance of it, and the traverse with which it concludes must go to a material point which will try the merits of the cause. We think this substantially such a

plea. The declaration goes upon a general appointment as administrator, and alleges breaches occurring nearly two years subsequent to the appointment. The plea, in its inducement, states the appointment to be a special one, made by the clerk in vacation, to continue till the next term of the court; that the appointment was not confirmed at that term, and that no breach occurred prior thereto. Now, as the clerk had only power to make an appointment that should continue till the next term of the court, and as that made was not, according to the plea, confirmed at that term, it would seem that Chrisman could not have been administrator of said estate at the time the maladministration took place; and if not, his sureties could not be liable for it. As to the traverse, it denies directly that Chrisman was administrator at the time of the commission of the alleged breaches. The decision of that question would certainly determine the merits of the case. It has been objected that the special traverse was not the proper plea to have been adopted on this occasion; that it should have been a simple traverse of the fact that Chrisman was administrator at the time of the alleged breaches. Suppose this to be true, as to which we give no opinion, still, as the plea adopted contains that very traverse, the inducement can be regarded as nothing worse than surplusage, which does not vitiate upon general demurrer, as upon which we must decide upon this plea.

The plaintiff, then, not seeing fit to demur to the plea specially, and it being good, as we have seen, upon general demurrer, what course was left for him to pursue in regard to it? Stephens, in his work on Pleading, p. 189, says: "As the inducement of a special traverse, when the denial under the *absque hoc* is sufficient, can neither be traversed nor confessed and avoided, it follows that there is, in that case, no manner of pleading to the inducement. The only way, therefore, of answering a good special traverse, is to join issue upon it." See, also, *The Mayor of Oxford v. Richardson et al.*, 4 T. R. 437; and *Benner v. Elliott*, 5 Blackf. 451. And this is but the general rule as to all good traverses. There cannot be a traverse upon a good traverse, and there cannot be a confession and avoidance of a good traverse. Issue must be taken on it. In this case, suppose the defendant had simply traversed the fact that Chrisman was administrator, could it have been possi-

ble for the plaintiff to have confessed the fact that he was not administrator, and still avoided it so as to hold him liable as being administrator?

It remains but to determine whether the replication in this case does take issue on the plea. The plea is, that Chrisman was not administrator at the time of the alleged breaches. The replication should have simply and directly joined issue upon it. It does not do this, but recites facts and circumstances, going to show that Chrisman was administrator, but not such, we think, as, if true, would establish the fact.⁴³ * * *

* * * * *

43. *Must conclude with a verification.* "With respect to the verification, this conclusion was adopted in a special traverse, in view of another rule, * * * viz., that wherever new matter is introduced in a pleading it is improper to tender issue, and the conclusion must consequently be with a verification."—Stephan on Pleading (Tyler's Ed.) 192.

PIKE v. HUNTER.

Supreme Court of the District of Columbia. 1885.

4 Mackey, 531.

JAMES, J., delivered the opinion of the court.

This is a *qui tam* action to recover the penalties provided by the following sections of the Revised Statutes:

Sec. 2116. No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of one thousand dollars." * * *

Sec. 2117. Every person who drives or otherwise conveys any stock of horses, mules or cattle, to range and feed on any land belonging to any Indian or Indian tribe, with-

out the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.

Sec. 2118. Every person who makes a settlement on any lands belonging, secured or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of one thousand dollars.

Authority to bring an action in this form is provided by section 2124, as follows: "All penalties which shall accrue under this title shall be sued for and recovered in an action in the nature of an action of debt in the name of the United States, * * * the one half to the use of the informer, and the other half to the use of the United States."

The declaration alleges that these penalties have been incurred by acts of the defendant relating to lands owned by the Cherokees, and to lands held by the Cheyenne and Arapahoe tribes. It contains four counts; two of them under section 2116, and two under section 2118. The first is for an alleged negotiation with the Cherokees; the second for an alleged negotiation with the Cheyennes and Arapahoes; the third for an alleged settlement and marking of boundaries on lands of the Cherokees, and the fourth for an alleged settlement and marking of boundaries on lands of the Cheyennes and Arapahoes.

The cause stands for trial on the pleas to the first and second counts, and these issues are not before us. To the third and fourth counts, which allege a settlement and marking of boundaries on lands of the Cherokees and of the Cheyennes and Arapahoes respectively, the pleas interposed were, first, the general issue; second, a special traverse that the defendant had entered upon and occupied the lands in question for grazing purposes only, under a license or lease from the Indians, and *without this* that he had made any settlement,⁴⁴ or surveyed or attempted to survey or designate any boundaries on these lands. On the general issue there was a joinder, and to the special traverse a demurrer. The latter was overruled in the circuit court, and from this order the present appeal is taken. The only question before us then is, whether the case stated affirma-

⁴⁴ There is an error in the wording of this sentence as given in the official report, which is here corrected. The language in the report is "and that without this he had not made any settlement."

tively in the special traverse, constitutes the unlawful act charged in the declaration, for which a penalty is provided by section 2118.

At the argument of the demurrer counsel for plaintiff insisted that, consistently with the plea, it might still be true that the defendant had surveyed and marked boundaries on these lands, and that plaintiff's allegation to that effect—constituting, as he claimed, a distinct offence under the statute—was therefore admitted by the plea. This objection ignores the character of the plea. The object of a special traverse is to accompany the direct denial of plaintiff's averment with an explanation of the ground on which that denial is based. This explanation takes the form of an affirmative statement of what the defendant had actually done, and it is put forward as a disproof and defeat of the plaintiff's alleged case. Stated in technical language, the defendant may be understood to say: "What I actually did was as follows, and this is not equivalent to the act which plaintiff avers; therefore I wholly deny his averment." In this way he presents separately a question of law, whether the case stated by himself, which he offers to prove, is equivalent to the case stated against him, or, on the contrary, disproves the latter and justifies a denial of it. In the plea before us the defendant directly and fully denies that he made any settlement, or surveyed or marked boundaries as alleged. But in his "inducement" he explains that he so denies because he had simply occupied these lands for grazing purposes only, and this under a lease or license from the Indians. There is no room, therefore, for the criticism that such a plea is consistent with his having surveyed and marked boundaries, and consequently admits the allegation that he had done so. The only question raised by the demurrer, then, is whether the case stated affirmatively by the defendant still amounts to the case stated in the declaration, and subjects the defendant to the penalties of the statute. This brings us to a consideration of the meaning of the statute.

* * * Section 2117 does not forbid, but permits, an occupation of Indian lands, with the consent of the Indians, to the extent of using them for grazing purposes only.
* * * A license or lease for grazing purposes only, that is for a limited use, subordinate to the title of the Indians and recognizing that title, involves none of the pretensions

which section 2118 is intended to suppress. It does not in any way involve dispossession of the Indians, nor contemplate such dispossession. We are of opinion, therefore, that the case stated in the affirmative part of this plea sustains the direct denial with which the plea concludes. The demurrer is consequently overruled, and the cause is remanded for further proceedings.

HUNT v. CHAMBERS.

Court of Errors and Appeals of New Jersey. 1845.

21 New Jersey Law, 620.

This was an action of replevin brought by Chambers against Hunt to recover a sloop, etc. The defendant below pleaded that the sloop was the property of the defendant, and not of the plaintiff, and prayed a return. Réplication that the sloop, etc., at etc., was not the property of the defendant but of the plaintiff, and issue to the country.

* * * * *

CARPENTER, J.: * * *

* * * On property pleaded, and issue thereon, on whom does the onus of proof lie? * * *

* * * * *

* * * Upon the plea of property it is not sufficient to allege property in the defendant; such allegation would be but an argumentative denial of the plaintiff's allegation; the plea must go further, and by an express traverse deny that the goods are the property of the plaintiff.

The direct denial under the *absque hoc* is rendered necessary by this consideration: that the affirmative matter taken alone would be only an indirect, or as it is called in pleading, an argumentative denial of the precedent statement, and by a well-known rule, all argumentative pleading is prohibited. In order, therefore, to avoid this fault of argumentativeness, the course adopted is, to follow up the explanatory matter of the inducement, with a direct denial. Steph. Pl. 179 (Phil. 1845). This plea, so selecting some material allegation in the plaintiff's declaration, and after a formal inducement, meeting that allegation by a formal

denial, is called a special traverse. The inducement is an indirect denial, the traverse is a formal denial. Steph. Pl. 184-5. The inducement is *not* in the nature of a *confession and avoidance*, a point necessary to be adverted to and understood, and of which a mistaken impression has, in regard to this plea, led to error. This plea does not confess the allegation of property or the right of possession; it does not confess any part of the allegation of the plaintiff and then avoid its effect by new affirmative matter; but it is simply an indirect denial, introductory to, and the foundation of, the direct denial which immediately succeeds. Steph. Pl., 185-6.

This traverse by the defendant in his plea, if well taken, must be met. The inducement cannot be traversed. If the first traverse be well taken and material, there can be no traverse on a traverse, and upon satisfactory reason. "By the first traverse, a matter is denied by one of the parties, which had been alleged by the other, and which having once alleged it, the latter" (the plaintiff) "is *bound to maintain* instead of prolonging the series of the pleading and retarding the issue, by resorting to a new issue." Steph. Pl. 186-7. The meaning of this rule, says Judge Gould, is, that when one party has tendered a material traverse, the other cannot leave it, and tender another traverse of his own on the same point, but must join in that first tendered; otherwise the parties might alternatively tender traverses to each other, in unlimited succession without coming to an issue. Gould Pl., p. 400, ch. 7, sec. 42. Without alluding to the exceptions to this rule, if any, of which the present instance is not one, it is sufficient to say that a traverse can properly be tendered, only on a point material, for the obvious reason that what is immaterial cannot decide the controversy. When the inducement and the traverse, as in the present instance, go to the same point, to wit, a denial argumentatively and directly of the plaintiff's allegation, the traverse is but an inference from the inducement.

* * * * *

To the plea of property, therefore, by which the defendant, in a formal mode prescribed by the rules of pleading, denies the property in the plaintiff, the plaintiff must reply by reaffirming his own title, and tendering an issue to the country. The inducement, as it cannot be pleaded to, can of consequence form no part of the issue; and if it be de-

nied, as has been unnecessarily done in the present instance, such denial is immaterial. It is only necessary for the plaintiff to reaffirm his own title, and such is the mode of pleading adopted in some of the most authoritative precedents. Lilly's Entr. 357, 358, 512; 2 Rich. K. B. 455; and other collections that might be cited. If the issue be joined on the reaffirmance by the plaintiff of his allegation, it is obvious that the issue is: *property in the plaintiff or not.*

The affirmative, therefore, is on the plaintiff, and such appears to be the result not only on the reasons applicable to this particular issue, but upon the principles which appertain to traverses in general. * * *

* * * * *

So are the subsequent authorities, and I have been unable after a diligent search, to find a well-considered case in which under this plea and issue, the *onus* of the proof was thrown upon the defendant. * * *

* * * * *

The results of these authorities and of this reasoning is, that when issue is joined on a special traverse, the party traversing, in general, is not bound at the trial to prove the affirmative part or inducement, but is entitled (as in ordinary cases) to insist on the negative of the issue joined. It was so held in a late case in the Common Pleas of England, which has come under my observation since the preparation of this opinion. The declaration was for carelessly impinging with a ship against the plaintiff's bridge, and thereby doing damage. The plea was, that plaintiffs improperly narrowed the channel by an obstruction *without this* (i. e., traversing), that the damage was occasioned by the carelessness of the defendants. On motion for a new trial it was held, that under this plea the defendants were entitled to give evidence in disproof of carelessness, after they had failed to establish the obstruction imputed to the plaintiffs; and such evidence having been rejected, the cause was sent back for a second trial. *Cross Keys Co. v. Rawlings et al.*, 3 Bingh. N. Cas. 71.

The burthen of proof, in my judgment, rested upon the plaintiff, it being necessary for him to prove such property in himself as would support replevin, to wit, an exclusive right of possession of the sloop in himself; and the defendant was entitled to rebut such testimony. The defendant did offer to rebut the *prima facie* case shewn by the

plaintiff. He offered to prove that he owned one-half of the vessel, and that he was in possession of her by the assent of the plaintiff, in the double capacity of master and joint owner, previous and up to the commencement of the action. This evidence, in my judgment, was lawful and competent, and * * * having been overruled, I am of opinion that the judgment must be reversed.

Judgment reversed.

SECTION 3. THE GENERAL ISSUES.

FULLER v. ROUNCEVILLE.

Superior Court of Judicature of New Hampshire. 1854.

29 New Hampshire, 554.

Trespass, for taking and carrying away the plaintiff's sleigh. Plea, the general issue. * * *

It appeared that the sleigh was formerly the property of Ela Rounceville, and that in March, 1851, it came into the possession of the plaintiff, where it remained until the defendant took and carried it away, in December, 1851. The plaintiff gave in evidence a note, dated April 20, 1850, for the sum of \$22.28, signed by Ela Rounceville and payable to the plaintiff, on demand, with interest, and George Fuller, called by the plaintiff, testified that the sleigh was pledged to the plaintiff, and in that way came and remained in his possession until taken by the defendant. * * * The defendant offered to prove that prior to the alleged pledge, the sleigh was mortgaged by Ela Rounceville to James B. Sumner, and that he (Sumner) authorized the defendant to take the sleigh. But the plaintiff's counsel objected that this could not be shown under the general issue, and the court sustained the objection. * * *

A verdict was returned for the plaintiff, which the defendant moved to set aside. It was ordered that the questions arising in this case should be transferred to this court for decision.

* * * * *

WOODS, J.: Two questions are involved in the case.

The first arises upon the ruling of the court rejecting the evidence of the mortgage of Ela Rounceville to James B.

Sumner, and of the authority of Sumner to the defendant to take the sleigh. It was rejected upon the ground that the evidence was inadmissible under the general issue. That it would have made out a perfect defence to the action of trespass, if receivable, admits of no doubt. The offer was to show a mortgage prior in point of time to the title of the plaintiff, whatever that might have been, and peaceable possession taken of the property mortgaged, by the defendant, an agent of the mortgagee. The taking the possession in that manner is the act complained of.

The question made in this branch of the case is, whether that evidence was admissible under the general issue, or whether the facts should have been specially pleaded. The rule upon this subject would seem to be well and distinctly settled in the books.

In 2 Saunders on Pl. and Ev. 855, it is said that "the defendant may, under the general issue, give in evidence any matter which directly controverts the truth of any allegation which the plaintiff, on such general issue, will be bound to prove." A similar rule is recognized in 2 Saund. Rep. 159, note 10.

Chitty says: "In trespass, whether to the person, personal or real property, the defendant can, under the general issue of not guilty, give in evidence any matter which directly controverts the fact of his having committed the acts complained of." 1 Chitty's Pl. 500 (8th Am. Ed.).

In *Peavey v. Walter*, 6 Carr & Payne, 232, which was trespass for driving a gig against the horse of the plaintiff, and wounding him, it was held that it might be shown, under the general issue, that instead of the defendant driving against the plaintiff's horse (as a witness for the plaintiff had first testified), the plaintiff drove against the gig of the defendant. The abstract of the opinion in that case is, that "under not guilty, in trespass, that only can be given in evidence which shows that the defendant did not do the act complained of." In *Gerrish v. Train*, 3 Pick. 126, Mr. Justice WILDE remarks that, in trespass *de bonis*, "if the defendant pleads property in himself or a third person, this is no admission that the property is the plaintiff's but it is an allegation inconsistent with a material allegation in the declaration, and a traverse is necessary." That same fact, given in evidence, would go to disprove the same material allegation. In trespass to personal

property, in general the defendant may show, under the general issue, that the chattels in question are not the plaintiff's property. 2 Sir Wm. Blackstone's Rep. 701; 2 Saund. Pl. & Ev. 855. In *Rawson v. Morse*, 4 Pick. 127, MORTON, J., says that "in trespass *quare clausum fregit*, the defendant may give in evidence, under the general issue, any matter that contradicts the allegations which the plaintiff is bound to prove, or shows that the act complained of is not in its own nature a trespass. Thus he may give in evidence soil and freehold in himself, or in another by whose authority he entered, or that he has any other right to the possession. For he cannot be a trespasser in exercising a right which the law gives him, nor be bound to justify when he does not, *prima facie*, appear to be a trespasser." But it is well settled that, in general, matters which admit the plaintiff's property as well as the seizure and carrying away, etc., must be pleaded. Com. Dig. Pl. 3 M. 25; 2 Saund. Pl. & Ev. 855; 1 Chitty's Pl. 502 (8th Am. Ed.). Chitty states the rule thus: "Where an act would, at common law, *prima facie*, appear to be a trespass, and the facts stated in the declaration could not be denied, any matter of justification or excuse, or done by virtue of a warrant or authority, must, in general, be specially pleaded; and, therefore, even where the defendant did the act at the request of the plaintiff, or where the injury was occasioned by the plaintiff's own fault, those matters of defence must always have been specially pleaded. 1 Chitty's Pl. 501. In *Rawson v. Morse*, 4 Pick. 127, before cited, it is said that "a license from the plaintiff must be specially pleaded, but a license from a stranger, in whom the soil and freehold are, may be proved under the general issue."

The doctrine, as laid down by our own court in *Stow v. Scribner*, 6 N. H. Rep. 24 (a case cited by counsel), which was trespass for killing a horse of the plaintiff, is thus: "Matters which do not directly contradict that which a plaintiff is bound to prove, in an action of trespass, under the general issue, but which show collaterally that the action is not maintainable, must be specially pleaded, or a brief statement of the matter must be filed under the statute." The same principle is recognized in *Welch v. Nash*, 8 East 39, which is a case in a clear manner illustrating the doctrine.

If the matters offered in defence constitute a direct denial of the allegations in the plaintiff's declaration, which, under the general issue, are essential to be proved, in order to maintain the plaintiff's action, or, in other language, if the matters offered in defence are a direct denial of the material allegations of the declaration, essential to be proved, and inconsistent therewith, the same may and ought to be given in evidence under the general issue.

But if the matters relied upon as an answer to the action do not involve a denial of the material allegations in the writ, but are consistent with the existence of such a state of fact as would constitute, at common law, a *prima facie* case of trespass, and amount only to an excuse or justification of such *prima facie* trespass, they cannot be given in evidence under the general issue, but must be specially pleaded.

Under the general issue it is necessary that the plaintiff should show either the actual possession or the constructive possession of the thing injured, as well as a general or qualified property therein. 1 Term, 480; 4 Term, 490; 1 Chitty's Pl. 500, before cited; 2 Saund. Pl. & Ev. 855, 861 (3d Am. Ed.). It denies and puts in issue the plaintiff's property as well as the taking by the defendant. It is true, that proof of the actual possession by the plaintiff of the chattel at the time of the trespass will, in all cases, suffice to sustain this action against a mere wrongdoer not being the real owner of the chattel. 2 Saund. 47d; *Chatteris v. Cowper*, 4 Taun. 547.

In the case under consideration, it was admitted that Ela Rounceville was once the owner of the sleigh in question, and the plaintiff claimed to have derived a title from him as the pledgee of the property, for a valuable consideration. The title, which the defendant proposed to prove as a ground of defence, was a mortgagee's title, derived from Ela Rounceville, and acquired prior to the date of the pledge to the plaintiff by one James B. Sumner. Here, then, was a proposition to disprove the title of the plaintiff, by showing an elder and better title in said Sumner. The defendant proposed further to show that in taking the sleigh he acted by the authority of Sumner, who was thus clothed with a mortgagee's title.

In effect, then, the defendant offered to show that Sumner was the owner of the property by an elder and better

title than that claimed by the plaintiff, and that in virtue of that title, and of the right of possession which accompanied it, by direction of Sumner and under his authority, the defendant took possession of it, which was, in point of law, the act of Sumner. *Rawson v. Morse*, 4 Pick. 127, before cited.

In the act complained of the defendant stood in Sumner's place. *Merritt v. Miller*, 13 Vermont Rep. 419, before cited. It is clear that the matters of defence, relied upon in this case, were a direct denial of the allegations of property in the plaintiff, as well as of all right of possession in him, as against the defendant, at the time of the act of trespass complained of.

They were, then, a direct denial of the essential allegations necessary to be proved by the plaintiff upon the plea of the general issue, and according to the whole current of the authorities receivable in evidence under the general issue.

* * * * *

*Verdict set aside and a new trial granted.*⁴⁵

45. A license, while not admissible as a defense unless specially pleaded, may nevertheless be shown in mitigation of damages under the general issue.—*Hendrix v. Trapp* (1845) 2 Rich. L. (S. C.) 93; *Hamilton v. Windolf* (1872) 36 Md. 301.

BRIGGS v. MASON.

Supreme Court of Vermont. 1859.

31 Vermont, 433.

ALDIS, J.: This is an action of trespass for taking a great number of articles of personal property. It comes to this court upon two bills of exceptions, one upon the decisions of the court upon a trial under the general issue, the other upon decisions upon a demurrer at a former term.

* * * * *

As to the other articles claimed by the plaintiff on the trial under the general issue, the court held that as the plaintiff had himself, in order to show the taking by the defendants, put in the writ and return which justified the

taking by the defendants, they might rely upon the justification so shown under the general issue.

The general rule, that matter of justification must be pleaded specially and cannot be shown under the general issue, is admitted. But the defendants seek to establish an exception, viz., that when the plaintiff's own evidence to show the trespass also shows those facts which justify the trespass, so that in point of fact no *prima facie* trespass is proven by the plaintiff which is not at the same time disproved, then the matter in justification may be relied upon under the general issue. It is urged that the object of requiring a special plea is to apprise the plaintiff of the facts to be relied upon in defence; but that where the plaintiff himself proves those facts the reason of the rule ceases.

There is much force in these considerations, but from an examination of the decided cases in this State, we do not feel at liberty to regard the question as open to discussion. They seem to be conclusive against the establishing of the exceptions.

Allen v. Parkhurst & Fuller, 10 Vt. 557, was an action of trespass in which the plaintiff, to prove the seizing of his person (which was the trespass complained of), gave evidence of the warrant upon which he was arrested and which the defendant claimed to justify the trespass. There was no special plea. The defendant insisted that as the plaintiff put in the evidence, he (the defendant) might rely on it under the general issue. COLLAMER, J., says, "The rules of evidence and pleading are in strict accordance and consistency and constitute a system, the symmetry of which, in the action of trespass, has not been destroyed by any modern relaxations or exceptions in the science of special pleading. The party is bound to prove what he alleges, so far as the same is denied, and he is neither bound nor permitted to prove more." Again, "the general issue in trespass is a denial of the facts stated in the declaration. It requires the plaintiff to prove these facts, and it permits the defendant to simply contradict these facts, and it permits no more. If the defendant has matter of justification he must specially plead it, or he cannot be permitted to prove it or insist upon it, if it casually appears." These principles of law as applied in that case are decisive of the question.

Walker v. Hitchcock, 19 Vt. 634, was trespass to the realty. The court say (BENNETT, J.) "it is claimed that as the plaintiff gave the record in evidence to show a title in himself, the defendant may claim the benefit of it as a bar to the action, without pleading it. No authority has been produced to show that in such a case the special plea may be dispensed with; and I can discover no reason why it should be. The plea of not guilty is simply a denial of the facts stated in the declaration; every cause is to be tried upon the issue joined between the parties; and the evidence is to be received and applied only as it bears upon the issue which the parties have seen fit to join."

In *Richardson v. Stockwell*, decided in Essex county, at the August term, 1858, the very point was again considered and the rule reaffirmed. The reasonableness of the rule was vindicated upon the ground that the defendant, by omitting to plead the justification specially, might be assumed by the plaintiff to have waived defence on that ground; and if allowed to claim it under the general issue, the plaintiff would be surprised and prevented from properly replying to such defence, and from having his proof ready at the trial. Without further considering the reasonableness of the rule, we rest upon these decisions as having settled the question in this State. The ruling on this point was therefore erroneous.

* * * * *

RIDGELEY v. TOWN OF WEST FAIRMONT.

Supreme Court of Appeals of West Virginia. 1899.

46 West Virginia, 445.

ENGLISH, J.: This was an action of trespass on the case brought by William Ridgeley against West Fairmont, a municipal corporation, in the circuit court of Marion County. The facts upon which the suit is predicated, as appears from the pleadings, are that the plaintiff was the owner of about one acre of land, except the coal underlying the same, which fronted on the public highway, known, in 1892, as the "Fairmont and Weston Turnpike," on which

was situated a two-story frame dwelling house, and a two-story frame storehouse jointly, both of which buildings stood near said turnpike. Subsequently plaintiff erected on said land another two-story frame building used for a dwelling and storehouse combined. Said buildings were erected and used in conformity with the grade of said Fairmont and Weston Turnpike, as it existed at the time they were built, and in December, 1892, a part of the territory of Fairmont district was incorporated, and became a municipal corporation, under the name of "West Fairmont;" and in 1892 said corporation established all that part of the Fairmont and Weston Turnpike lying within its limits, including that part adjacent to said land, as one of its streets, and called it "Main Street," or "Locust Avenue," and in September, 1894, changed the grade and raised the surface of said street in front of, and adjacent to, said plaintiff's property, by filling the same with dirt, gravel, stone, etc., and without his consent and against his protestations, raised the grade, fifty-six inches higher than it was when plaintiff became the owner of said property and the houses thereon; and the plaintiff claims that he is damaged by the drainage of water on his lot caused by the change of grade, and that he is thereby deprived of all safe, commodious, and convenient egress and ingress from and to said land, and the houses thereon; and, by reason of said wrongs and injuries, he claimed five thousand dollars damages. * * *

* * * The gravamen of the plaintiff's declaration appears to be that, without the consent of the plaintiff, the defendant has raised the grade of the street in front of his property, so that surface water is thrown upon plaintiff's lot, which, with the buildings on it, is thereby damaged without the plaintiff's consent, and he is thereby deprived of all safe, commodious, convenient, and proper ingress and egress to and from said land. Now, while it is true that, where the defendant seeks to confess and avoid in trespass, a special plea is required, in the case at bar the plaintiff avers in his declaration that the grade was changed in front of his property, and the injury complained of resulted therefrom, without his consent, and under the general issue, surely the defendant might be permitted to show that the grade was raised with his consent, especially when he was paid a consideration for it. As to

the evidence which may be given under the general issue in an action on the case, Hogg, in his valuable work on Pleading and Forms (184), says: "The general issue, as we have seen, in actions *ex delicto*, is that of 'not guilty;' " giving the form of the plea, and adding: "Under which may be given in evidence a former recovery, release or accord and satisfaction, or whatever would, in equity and good conscience, according to existing circumstances, preclude the plaintiff from recovering, as any matters which operate a discharge of the cause of action, or any justification or excuse. By this plea, all the material averments of the declaration are put in issue"—citing 1 Chit. Pl. 490. The same strictness in pleading does not obtain in trespass on the case as in trespass. The law is stated thus in 18 Am. & Eng. Ency. Law, 534: "At common law, the general issue 'not guilty' is in form a traverse or denial of the facts which form the subject of complaint. On principle the evidence admissible under it should be confined to matters of defense which rest in denial. But, by gradual relaxation of the practice similar to that which occurred in assumpsit, evidence came to be received, not only of matters in denial, but of defenses by way of confession and avoidance. There is, therefore, an essential difference between actions of trespass and on the case. The former are *stricti juris*, and accordingly a former recovery, release, or satisfaction cannot be given in evidence under the general issue, but must be specially pleaded. But the latter are founded on the mere justice and conscience of the plaintiff's case, and are in the nature of a bill in equity, and in effect are so, and therefore a former recovery, release, or satisfaction need not be pleaded, but may be given in evidence under the general issue. On the general issue, the plaintiff is put to the proof of his whole case, and the defendant may give in evidence any justification or excuse of it. Thus, a license which in trespass must be pleaded may in case be given in evidence under 'not guilty.' " To the same effect, see Andrew, Steph. Pl. 238, section 118; also opinion of Lord MANSFIELD in *Bird v. Randall*, 3 Burrows, 1353, in which he asserts the doctrine above announced, and draws the distinction between trespass and trespass on the case. See, also, 1 Bart, Law Prac. 503; *Greenwalt v. Horner*, 6 Serg. & R. 77. So, also, in *Hills v. Railroad Co.*, 18 N. H. 179, it is held: "In

an action on the case for an injury to the plaintiff's land, it is not necessary to plead specially. Evidence that the acts complained of were done by the permission of the plaintiff is admissible under the general issue, and *a fortiori* that they were done at the request and by the direction of the plaintiff." Authorities might be multiplied in support of this proposition, but these are sufficient to show the trend and weight of authority on the question.

Bill of exceptions No. 10, taken by defendant, shows that he offered to prove by several witnesses that, at the time the improvement was made in front of this property, the plaintiff agreed that, if they would put in tiling from the end of the culvert on the side of the street nearest his property to a point near his dwelling house, which was said to contain fourteen rooms, he would take that in consideration of all damages by said improvement to his property, and that defendant put in said tiling according to contract; which evidence was objected to by the plaintiff, and excluded by the court. It is presumed this ruling of the court was based on the supposition that this evidence was not admissible under the general issue. Counsel for the defendant in error insist that it would have been error to permit this evidence to go to the jury, because there was no such defense set up by special plea, and it could not be shown under the general issue. We have, however, discussed this point above, and hold that the evidence was admissible under the general issue, and the court erred in excluding it, to the prejudice of the defendant.

* * * * *

Reversed.

ROGERS v. ARNOLD.

Supreme Court of New York. 1834.

12 Wendell, 30.

By the Court, NELSON, J.: It has been long settled in this State that the possession of personal chattels by the plaintiff, and an actual wrongful taking by the defendant are sufficient to support replevin, and that it may be

brought, where trespass *de bonis asportatis* will lie. 7 Johns. Rep. 140; 17 id. 116; 1 Wendell, 109; 10 id. 322, 349.

* * * * *

As the pleading in this action is in some respects complicated and peculiar, as given in the books, it may be useful to examine some of its principles, and the cases adjudged on the subject. The revised statutes have in some measure simplified the pleadings, p. 529, sec. 44. The form of pleading, however, as it existed heretofore, may be resorted to at the option of the defendant.

The general issue of *non cepit*, in the case of a wrongful taking, puts in issue not only the taking, but the place where taken, if material, 2 R. S. 528, sec. 29; and in case of a wrongful detention, the general issue, to wit, that the defendant does not detain the goods, etc., puts in issue not only the detention of the goods, but the property of the plaintiff. The distinction here made between the effect and operation of the general issue, in the cases of *non cepit* and *non detinet* is in analogy to that existing in the actions of trespass and trover. In the one the defendant cannot, under the plea of not guilty, show property out of the plaintiff, but he may in the other. 11 Johns. R. 132, 528; 13 id. 284; 14 id. 132, 353; 15 id. 208. The reason of this distinction is, that the action of trespass is founded upon the right of the plaintiff to the possession of the goods taken, and that of trover to the right of property. It should be remembered, however, that possession is *prima facie* evidence of right, and conclusive against all the world, except the true owner, or one connecting his title with him. This principle goes far to assimilate these two remedies in practice. The distinction, however, still exists in regard to the defence to be given in evidence under the general issue.

It is laid down generally, and in all the books on this branch of the law, that the defendant in replevin may plead property in himself, or in a stranger, in bar of the action, and pray for a return and damages. So he may plead property in himself and the plaintiff, or in a stranger and the plaintiff, or if there are two plaintiffs, in one of them, etc. All these different pleas are obviously founded upon the principle applicable to this action, that the plaintiff, as in trover, must recover upon the strength

of his title to, or property in the goods in question, and in this respect there is a shade of difference between this action and trespass. 2 Selw. 911; Gilb. Rep. 119; 1 Chitty's Pl. 158, 159; Woodf. Landlord & Tenant, 473. Under the plea of *non cepit* we have seen the caption only is put in issue, except the place, when material; and if the defendant intends to deny the property of the plaintiff, he must plead it, or give notice under the general issue. Now it is clear that all these different pleas of property in the defendant, etc., are used for the purpose, and to the end of showing it out of the plaintiff who holds the affirmative, and must sustain the allegation of property in himself; and what must be proved on one side, may be disproved on the other. *Non cepit* admits property in the plaintiff, and hence the necessity of the different pleas of property in others, to enable the defendant to contest it.

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SMART v. BAUGH.

Court of Appeals of Kentucky. 1830.

3 J. J. Marshall, 363.

Opinion of the court by ROBERTSON, C. J.

This is an action of detinue, by *J. P. Smart v. Betsy Baugh*, for a female slave named Catharine. On the general issue a verdict and judgment were rendered for the defendant.

* * * * *

On the motion of the defendant's counsel, the court instructed the jury:

* * * * *

That if those from whom the defendant derived her claim had been in possession of Catharine more than five years before the institution of this suit, holding her adversely to the claim of the plaintiff, his right was barred and he could not recover.

* * * * *

The statute of limitations may avail a defendant in detinue under the general issue. The plea is in the pres-

ent tense (*non detinet*), and under this issue anything (except a pledge) which will show a better right in the defendant than in the plaintiff may be admitted as competent evidence.

The plea puts in issue the plaintiff's right. Five years' uninterrupted adverse possession of a slave, not only bars the remedy of the claimant out of possession, but vests the absolute legal right in the possessor. Therefore, proof of such possession may show that the claimant has no right to the slave, and therefore cannot recover.

Consequently, it would seem to result, from the reason of the case, that the adversary possession may be proved under the general issue.

The same reason does not apply to *assumpsit*, because the statute of limitation does not destroy the right "*in foro conscientiae*" to the benefit of the *assumpsit*, but only bars the remedy if the defendant choose to rely on the bar. Time does not pay a debt; but time may vest a right to property.

It was said by HOLT, in one case (*Draper v. Glassop*, 1 Ld. Ray'd, 153), that the statute of limitations might be given in evidence under the plea of "*nil debet*," and the following is the reasoning by which he attempted to maintain his opinion: "For the statute had made it no debt at the time of the plea pleaded, the words of which are in the present tense. But in case on *non assumpsit*, the statute of limitations cannot be given in evidence, for it speaks of a time past and relates to the time of making the promise. But upon *nil debet* pleaded, the statute is good evidence, because the issue is joined, *per verba de praesenti*, and it is no debt at this time though it was a debt."

This reasoning is applicable to the plea of *non detinet* in an action of detinue for property, and therefore in detinue it ought to be conclusive. But we doubt its application to the plea of *nil debet*, and therefore could not admit that the conclusion of Chief Justice HOLT is logical or consistent with the reason and analogies of the law. His deduction is the necessary consequence of his premises. For if, at the time of pleading *nil debet*, the statute of limitations had extinguished the debt, and in his language made it no debt, it would certainly be allowable to show the fact, under the plea that the defendant did not at the

time of pleading owe the debt. This is perfectly true in detinue for a slave, because in such a case the lapse of time has divested the plaintiff of his right of property, and vested it in the defendant. *Stanley v. Earle*, 5 Littel, 281. And, therefore, the lapse of time may in such a case be given in evidence under the general issue, to show that the plaintiff has no right to the property, and that the defendant has a perfect right. But it is not so in debt, because the statute of limitations does not destroy nor pay the debt. This has been abundantly established by authority since the time of HOLT. A debt barred by time is a sufficient consideration for a new *assumpsit*. The statute of limitations only disqualifies the plaintiff to recover his debt by suit, if the defendant rely on time in his plea. It is a personal privilege, accorded by the law for reasons of public expediency. And the privilege can be asserted only by plea; otherwise, that which, by barring the legal remedy, would conclude the legal right, will not affect either. The distinction suggested by HOLT between *nil debet* and *non assumpsit*, does not sustain the discrimination which he makes in the admissibility of evidence under the two issues. For although *non assumpsit* is in the past, and *nil debet* is in the present tense, yet it is known to be the law that whatever will show that the defendant does not owe anything at the trial will be admissible evidence under the plea of *non assumpsit*; and, therefore, if the statute of limitations would be admissible under *nil debet*, it would be equally so under *non assumpsit*. See 1 Cranch. 465, appendix.

We, therefore, consider HOLT's opinion as to the admissibility of evidence of limitation, under *nil debet*, as unsupported by principle, and as overruled by subsequent authorities. But his reasoning and his opinion apply necessarily to "*non detinet*," and so far it is good law, and has not been overruled. In Virginia it has been decided that the statute of limitations may be given in evidence, under the general issue, in detinue for property. See *Elam v. Bass' Executors*, 4 Munford, 301.

Under *nil debet* and *non assumpsit*, lapse of time may be admissible evidence, as far as it may tend to prove the fact of payment, but not as a legal and conclusive bar to the action. In detinue, the limitation may be proved under the general issue, as conclusive evidence of the de-

fendant's right to the property, unless the plaintiff can evade its effect, by showing some suspension of its operation.

In debt and *assumpsit* the statute must be pleaded. *Balantine on Lim.* 210. The statute 'does not destroy the debt, it only takes away the remedy, and the debtor may either take advantage of the statute or he may waive the statute.' *Ibid*, 208; *Burrows*, 2630.

But the adverse possession of a slave not only bars the remedy but destroys the right, unless the effect of time can be obviated by the proof of some saving disability. It might seem just and eligible, therefore, to plead the limitation, so that the plaintiff might have an opportunity to reply, some fact showing disability. But neither authority nor principle seems to require such a plea, in such a case, any more than they require a plea of title acquired by contract, which might be avoided by infancy or other disability.

* * * * *

VIRGINIA FIRE AND MARINE INSURANCE COMPANY v. BUCK.

Supreme Court of Appeals of Virginia. 1891.

88 Virginia, 517.

HINTON, J., delivered the opinion of the court.

This was an action on the case in *assumpsit* on a policy of insurance. Issue was joined on the plea of *non assumpsit*, and the defendant company, in accordance with a practice common in the circuit courts of this State, obtained leave to file special pleas within sixty days.

* * * * *

Three special pleas were filed in the clerk's office. To the first of these no objection was made; but the plaintiffs, treating the other two as tendered by the filing in the clerk's office, moved the court to reject them, which was accordingly done. The defendant then tendered a fifth plea, which, on the plaintiff's motion, was also rejected.

The rejection of these three pleas constitutes the first
C. L. P. 37

assignment of error. Upon this point we shall spend but little time, because, in the opinion of the court, every fact might have been proved under the general issue in the case which could have been proved under either of these pleas. Their rejection, therefore, could not have prejudiced the defendant.

"The fact is undeniable," says Mr. Minor, in his Institutes, "that for more than a century past there has been admitted, under the plea of *non assumpsit* in all actions of assumpsit, whether founded on an implied or express promise, any matter of defence whatever (the same as in the case of *nil debit*) which tends to deny his liability to the plaintiff's demand." 4 Min. Institutes, p. 645. And at page 641 of the same volume the author says: "Under the plea of *nil debit* the defendant may prove at the trial coverture when the promise was made, lunacy, duress, infancy, release, arbitrament, award and satisfaction, payment, a want of consideration for the promise, failure or fraud in the consideration, and, in short, anything which shows there is no existing debt due. The statute of limitations, bankruptcy and tender are believed to be the only defences which may not be proved under this plea, and they are excepted because they do not contest that the debt is owing, but insist only that no action can be maintained for it." And to the same effect seem to be all the authorities. 1 Chitty on Plead. (4th Amer. Edition), sec. 18; Stephen Plead. (4th Amer. Edition), p. 162, note 20; 1 Rob. (old) Prac. 210; 5 Rob. Prac. 259.

Nor can this court assent to the proposition that the statute, which allows the defendant to plead as many matters of defence as he may elect, confers upon him the "absolute right" to file special pleas setting up defences covered by a plea already received. Such a construction of the statute would be inconsistent with the authorities already cited, and, so far as we can see, could serve no good purpose. This same suggestion seems to have been made in *Fant v. Miller*, 17 Gratt. 47; but, said JOYNES, J.. "I think the object of the (special) plea was to set up the defence that the plaintiffs were not bona fide holders of the note on which the action was founded. That defence, however, might have been made, as in point of fact, it was made under the plea of *nil debit*, which issue had already been joined in 1853. The plea was, therefore, wholly un-

necessary, and this would have been good ground for rejecting it when offered if it had been objected to. *Reed v. Hanna's Ex'or*, 3 Rand. 56. And it was competent for the court to strike it out after it was received, even though issue had been joined upon it. *Kemp v. Mundell*, 9 Leigh. 12. The plaintiffs in error not having been deprived of any defence by the striking out of this plea, have not been injured by it, and cannot complain. The multiplication of issues, by special pleas, tends to embarrass the jury, and ought not to be encouraged, 'except in cases where, by law, the defence would otherwise be excluded or rendered unavailing.' "

It is suggested, however, if we correctly apprehend the brief of the plaintiff in error, that the plaintiffs below ought to have demurred to those pleas, "if insufficient in law," and should not have moved the court to reject them. But this, as the defendants in error point out in their brief, is generally an unsafe practice. The better way, undoubtedly, being to move the court, when it has not been received, to reject it. In *Reed v. Hanna's Ex'or*, 3 Rand. p. 62, the court said: "Where the objection to a second plea * * * is that the matter of that plea is already put in issue, the party ought not to be put to the hazard of a demurrer in order to avail himself of that objection, the proper and safe practice being to try that question on a motion to reject the plea, or to strike it out, if it has been entered on the record."

* * * * *

We see no error in the judgment of the circuit court, and the same must be affirmed.

Judgment affirmed.

WILBUR v. ABBOTT.

Supreme Court of New Hampshire. 1879.

59 New Hampshire, 132.

Debt, on a judgment recovered in Louisiana. This is the same case reported in 58 N. H. 272. The defendant pleaded *nul tiel record* to each count, and the plaintiff joined issue. The plaintiff filed three special replications to each plea, alleging that the defendant is estopped to plead *nul tiel record* because of certain proceedings in

the courts of Louisiana (set forth in the replications), whereby it was adjudged that he was estopped to deny the validity of the judgment declared upon. The defendant moved to reject the replications, on the ground that the plaintiff, having joined issue on the plea of *nul tiel record*, cannot set up any other matter as an answer to that plea.

SMITH, J.: In Gould Pl. c. 6, s. 10, *nul tiel record* is said to be the general issue in debt on judgment. So in Lawes Pl. 225. It is the only general plea in such an action, and puts in issue the verity of the record itself; and no evidence but that is admitted. *Pillsbury v. Springfield*, 16 N. H. 565, 572; Gould Pl. c. 6, s. 10; Story on Pl. 336. It is the proper plea when there is either no record, or where there is a variance in the statement of it. 1 Ch. Pl. 480, 481. The plea of *nul tiel record* does not conclude to the country, because the matter is to be determined by the court by inspection of the record. Hence it concludes with a verification, although it is a direct denial of the allegation in the declaration that there is such a record; and herein it differs from the general issue in other forms of action where the parties are at issue, when the defendant simply denies the essential part of the declaration. It confesses nothing, and avoids nothing; and there remains nothing for the plaintiff to do but to traverse the denial of the want of a record, concluding with a verification by the record.

For general purposes *nul tiel record* is the general issue, and in this case it can make no practical difference to the parties whether the estoppel is pleaded, or given in evidence under the issues which have been joined.

Motion granted.

VAN VALKENBURGH v. ROUK.

Supreme Court of New York. 1815.

12 Johnson, 337.

This was an action of debt on a bill obligatory, or sealed note, and was tried before Mr. Justice YATES, at the Orange circuit, in August, 1814.

The defendant pleaded *non est factum*, and at the trial entered into evidence to show that the note had been fraud-

ulently obtained, by substituting in the place of the note which the defendant intended to execute, one for a much larger amount. To this testimony the counsel for the plaintiff objected, that it was inadmissible under the plea, but the judge overruled the objection.

* * * * *

SPENCER, J., delivered the opinion of the court.

The evidence in this case looks towards a substitution of an instrument of a larger amount, for the one the defendant supposed he was executing. Had it been made out satisfactorily that there had been a note drawn for a smaller amount, that the defendant was defrauded into executing the note in question, by its substitution at the moment of execution, I cannot perceive any objection to the admission of such proof; and if made out, I think it would avoid the instrument upon the issue of *non est factum*. Chitty lays it down, that the defendant, on *non est factum*, may give in evidence that the deed was void at common law, *ab initio*; as that it was obtained by fraud, etc. (Chitty, Pl. 479). The fraud he refers to, must have been a fraud relating to the execution of the deed, for the issue involves only the execution of the instrument. In the case of an infant, he must plead infancy, and cannot give it in evidence on *non est factum*, because the deed is his, though he is not bound by it. A feme covert, having no capacity to contract, is not bound to plead coverture. If a deed be misread, or misexpounded, to an unlettered man, this may be shown on *non est factum*, because he has never assented to the contract. So, if a man be imposed upon, and signs one paper while he believes he is signing another, he cannot be said to have assented, and may show this on *non est factum*.

I will not pretend to say that there is not a great deal of technicality in the application of the rule, as to the cases in which you may give evidence impeaching the execution of the instrument, under the plea of *non est factum*, and those in which you may not. In the present case, the defendant was not unlettered, and there is not sufficient proof to warrant the verdict, that there was a substitution of one instrument for another. There must be a new trial.

*New trial granted.*⁴⁶

46. *Non est factum* is also the general issue in covenant, and its scope is the same as in debt on specialty. Stephan on Pleading (Tyler's Ed.) 171.

CUMMING v. BUTLER.

*Supreme Court of Georgia. 1849.**6 Georgia, 88.**By the Court, LUMPKIN, J., delivering the opinion.*

* * * * *

Four things are necessary to enable a person to support an ejectment, viz., title, lease, entry and ouster. And as the three latter are only feigned in the modern practice, the plaintiff would be nonsuited at the trial, if he were obliged to prove them. The courts, therefore, compel the defendant to enter into what is called the consent rule, by which he undertakes that at the trial he will confess the lease, entry and ouster to have been regularly made, and rely solely upon the merits of his title. In England, at present, the consent rule admits possession also. The consent rule is presumed to be taken in every case, and being at best but a useless form, its observance is dispensed with in point of fact; and this dispenses with all special pleading in ejectment. The defendant can plead only "not guilty," and the statute of limitations.

With us in Georgia, as in most of the States, the general issue in ejectment denies the defendant's possession, as well as the plaintiff's title. *Stevens v. Griffith*, 3 Ver. R. 448.

It was not necessary, therefore, in this case, that the defendant should have pleaded specially, that he was not in the possession of the premises in dispute, at the time suit was commenced. * * *

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CHAPTER VII.

AFFIRMATIVE PLEAS IN BAR.

SECTION 1. PLEAS IN CONFESSION AND AVOIDANCE.

CONGER v. JOHNSTON.

Supreme Court of New York. 1846.

2 Denio, 96.

By the Court, BRONSON, Ch. J.: Every plea in confession and avoidance must give color, by admitting an apparent or *prima facie* right in the plaintiff. It must either expressly or impliedly confess that but for the matter of avoidance contained in the plea, the action could be maintained. This plea makes no such confession, and is therefore bad. Instead of saying, as the pleader should have done, that the several causes of action mentioned in the declaration did not accrue within six years, the words are that the several supposed causes of action mentioned in the declaration "if any such there were, or still are," did not accrue within six years. The defendants do not admit, that but for the statute of limitations the plaintiff could have sued. The plea gives no color. *Margetts v. Bays* (4 Adol. & Ellis, 489) is a case in point. The action was debt on simple contract; and the plea was, that the supposed debt in the declaration mentioned, if any such there be, did not accrue within six years; and the plea was held bad on demurrer for not confessing the debt. The following cases will serve to illustrate the rule which has been mentioned: *Griffiths v. Eyles*, 1 Bos. & Pul. 413, 417; *Manchester v. Vale*, 1 Saund. 27, and note (1); *Brown v. Artcher*, 1 Hill, 266; *McPherson v. Daniels*, 10 Barn. & Cres. 263. But we are referred to a precedent from which the plea has evidently been copied. (3 Chit. Pl. 941, 7th Am. from 6th Lond. Ed.) This is not the first time that I have noticed precedents of questionable authority in the late editions of what was originally a very good book. In

the 3d American from the 2d London Edition of the work (Vol. 2, p. 498), the same plea is given without the qualifying words, "If any such there were, or still are," which make this plea bad.

*Judgment for the plaintiff.*⁴⁷

47. *Eavestaff v. Russell* (1842) 10 M. & W. 365:—"PARKE, B.—There can be no doubt whatever that the word 'supposed' is a sufficient admission of a cause of action. It is the usual and ordinary mode of pleading in cases of this nature; and I have seen instances without number, where, after a plea of the general issue, a special plea has followed, professing to answer the *supposed* causes of action in the declaration mentioned. The words 'if any' stand on a different footing."

BROWN v. ARTCHER.

Supreme Court of New York. 1841.

1 Hill, 266.

Demurrer to pleas. The declaration was for trespass *de bonis*, etc., and contained two counts, both of which alleged the taking by the defendants of certain goods, etc., the property of the said plaintiffs.

The defendants pleaded separately: 1. The general issue; 2. Proceedings against one Corl, a resident of the city of Detroit, in the State of Michigan, as an absent debtor, at the suit of the defendant Van Vliet, and one Hart; and that Artcher, under an attachment issued therein, seized the goods as sheriff of Albany. These pleas averred respectively, that the goods belonged to Corl. They also interposed a third plea, not materially different from the second.

The plaintiffs demurred to the special pleas, assigning for cause, among other things, that they amounted to the general issue; and the defendants joined in demurrer.

By the Court, COWEN, J.: It was held in the Year Book (27 H. 8, 21, case 11) that, in trespass *de bonis*, a plea that the goods were not the plaintiff's property was bad. The same thing was afterwards admitted in *Wildman v. Norton* (1 Ventr. 249, 2 Lev. 92, S. C. nom. *Wildman v. North*). I believe it has never been denied. Chitty says that "the defendant cannot plead property in a stranger or himself,

because that goes to contradict the evidence which the plaintiff must adduce on the general issue in support of his case." (1 Chit. Plead. 527, Am. Ed. of 1840.) The usual test of an objection that the plea amounts to the general issue is, whether it takes away all color for maintaining an action, by fixing a negative upon the plaintiff's right in the first instance. Thus, in trespass *quare clausum fregit*, the defendant pleading title in a third person, a demise to himself and an entry under that demise, this plea was held bad, because it shewed a right of possession in the defendant at the time when he entered and committed the trespass complained of. (*Collett v. Flinn*, 5 Cowen, 466.) So, a plea that he entered under a license from such third person. (*Underwood v. Campbell*, 11 Wend. 78.) Such a plea standing alone, virtually says, that the defendant did not commit any trespass in the plaintiff's close; and is, therefore, but another mode of pleading not guilty. It absolutely and necessarily denies all possessory right in the plaintiff, the contrary of which he must maintain, or he is not entitled to sue. Such a plea is said, by the books, in itself to take away all color or pretense for an action; and therefore, to be maintainable as a special plea, it must surmise some possession in the plaintiff, at the time, under color of a defective title. Taking away, in itself, all *implied color*, it must, in the manner mentioned, substitute what is called *express color*. (1 Chit. Plead. 529, Am. Ed. of 1840. 5 Cowden, 167, 8, note.)

The same rule of pleading has been applied to trespass *de bonis*. (1 Chit. Plead. 530, Am. Ed. of 1840; *Leyfield's case*, 10 Rep. 90.) Chitty says, a plea that A. was possessed of the goods in question as of his own proper goods, amounts to a denial that the plaintiff had any property in them, and therefore gives no color of action in itself. To remedy this defect, it must surmise that the defendant bailed the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them; or, a possession of the plaintiff under some other defective title. (*Vid. Fletcher v. Marillier*, 9 Adolph. & Ellis, 457.) It is peculiar to the action of trespass, that the defendant may surmise such possession, setting up a mere fiction, not traversable, and thus turn what would otherwise be defective as amounting to the general issue, into a special plea. (1 Chit. Plead. 530, Ed. before cited.)

But if such express color be not given, the plea of property in a stranger, or the defendant, is emphatically defective, in the case of trespass *de bonis*; for there, especially, no actual possession being expressly shown in the plaintiff, the law intends that it is with the general owner. Accordingly, the common count alleges merely that the things taken were the goods of the plaintiff, without otherwise showing possession. (2 Chit. Pl. 859, Am. Ed. of 1840.)

In the case at bar, all the pleas demurred to aver that the goods in question were the goods of Corl; each following out the averment with the allegation that the goods were therefore taken by an attachment against Corl. According to the books cited, had the pleas stopped with the averment of property in Corl, giving, as they do, no express color, they would have been bad as amounting to the general issue. Such an averment alone would have cut off all implied color; for it would be saying, they were not the plaintiff's goods, in manner and form as he has alleged in declaring.

This being so, the farther allegations, showing a lawful authority under the attachment to take them as the goods of Corl, certainly cannot help the pleas. To this, *Hallett v. Birt* (12 Mod. 120), cited by the plaintiff's counsel on the argument, is, as he supposed, in point against the defendant. The plea there was, that the plaintiff had taken and impounded property belonging to A., at whose suit the defendant, under a warrant directed to him, replevied the property. This was held bad; though the court agreed that if the plea had said, the plaintiff took and detained the property, and so it had been taken by the defendant from the plaintiff's possession, it might have been well enough. That is probably one mode of giving express color.

It was supposed by the defendant's counsel, on the argument, that the pleas, by not expressly denying the plaintiff's possession, confessed it, and so there is implied color; whereas it is expressly said, in *Wildman v. North* (2 Lev. 92), that a plea of property in a stranger, with a traverse that the goods belonged to the plaintiff, in trespass amounts to the general issue, though not in replevin. And it is on the authority of this case, among others, that Chitty says, the simple plea of property in a stranger would be bad in trespass. Stephen on Pleading (179, Am. Ed. of

1824) says, the general issue is applicable, if the defendant did take the goods, but they did not belong to the plaintiff. And it is said in Bacon's Abridgment (tit. Pleas & Plead. G. pl. 3, p. 372, Am. Ed. of 1813), that if in trespass, the defendant plead property in a stranger or himself, it amounts to the general issue. (Gould's Plead. pt. 2, ch. 6, sec. 78, p. 345, 1st Ed. S. P.) Such uniform language cannot be accounted for, unless, as I have already supposed, the allegation of property in a third person involves a denial of the plaintiff's possession.

The objection we have thus examined applies to all the pleas, and we are of opinion it is well taken.

It is not necessary to say, whether there be any foundation for the other objections of form specified by the demurrers.

Judgment for plaintiffs.⁴⁸

48. Stephan says of express color: "Color, in this sense, is defined to be 'a feigned matter, pleaded by the defendant in an action of trespass, from which the plaintiff seems to have a good cause of action, whereas he has, in truth, only an appearance or color of cause.' This is one of the most curious subtleties that belong to the science of pleading."—Pleading (Tyler's Ed.) 210.

McPHERSON v. DANIELS.

Court of King's Bench. 1829.

10 Barnewall & Cresswell, 263.

Declaration for slander stated, that the plaintiff before the time of the committing of the grievances thereafter mentioned, and from thence had been and still was a coach proprietor, and sold and disposed of cattle for divers persons for commission, and that he had never been suspected to be insolvent, or unable or unwilling to pay his just debts; that defendant contriving, and wickedly and maliciously intending to injure the plaintiff, and to cause it to be suspected and believed by his neighbors that the plaintiff was poor, and in indigent and bad circumstances, and incapable of paying his just debts, and debts to be by him contracted, and thereby to injure him in his trade and business, falsely and maliciously spoke and published in the

hearing and presence of divers good and worthy subjects of this realm of and concerning the plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, the false, scandalous, malicious, and defamatory words following, that is to say, "His (meaning the said plaintiff's) horses have been seized from the coach (meaning the said plaintiff's coach), on the road, he (meaning the said plaintiff) has been arrested, and the bailiffs are in his (meaning the said plaintiff's) house," thereby then and there meaning and intending that the said plaintiff was in bad and indigent circumstances, and incapable of paying his just debts. By means of the committing of which said grievances by the defendant, he the plaintiff was greatly injured in his good name, etc.; and also by means of the premises, one Morrison, who before the committing of the said grievances was about to send, and otherwise would have sent divers, to wit, eleven head of cattle to the plaintiff, for the purpose of being sold and disposed of by the plaintiff for Morrison for commission and reward payable to the plaintiff in that behalf, to wit, on the day and year aforesaid, wholly refused and declined so to do, and thereby the plaintiff lost and was deprived of the commission which would have been payable by Morrison to the plaintiff. Plea, that before speaking and publishing of the several words in the declaration mentioned, and therein supposed to have been spoken and published by the said defendant, of and concerning the said plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, to wit, on, etc., at, etc., one T. W. Woor of Swaffham, in the county of Norfolk, spoke and published the following words to the defendant of and concerning the plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, that is to say, "His (meaning the said plaintiff's) horses have been seized from the coach (meaning the plaintiff's coach) on the road; he has been arrested, and the bailiffs are in his house;" thereby then and there meaning that the plaintiff was in bad and indigent circumstances, and incapable of paying his just debts. And the defendant further saith, that at the time of speaking and publishing the said several words in the declaration as therein mentioned, he the defendant also declared, in the presence and hearing of the same persons in whose presence and hearing the said words were

so spoken by him the defendant, that he had heard and been told the same from and by the said T. W. Woor of Swaffham, in the county of Norfolk; wherefore he the defendant, at the said time when, etc., in the said declaration mentioned, did speak and publish of and concerning the plaintiff the said several words in the said declaration mentioned, as he lawfully might for the cause aforesaid. General demurrer and joinder.

* * * * *

PARKE, J. * * * This plea is bad for two reasons. To be a good plea it must confess and avoid the cause of action stated in the declaration. But this plea either does not confess, or if it confesses, does not avoid that cause of action. It appears from the case of *Bell v. Byrne*, 15 East, 554, that if a defendant has not made an assertion as his own, but has merely alleged that some other person had made it, it must be so averred; and that an averment in a declaration, that the defendant used slanderous words, must be taken to mean that he used them as his own words, and as a substantive allegation of his own; and will not be supported by proof, that he used them as the words of another person. To apply the principle of that decision to the present case, if the plea be understood to confess that the words were spoken as those of another person, and not as a direct assertion of the defendant himself, it does not properly confess the matter stated in the declaration; if, on the other hand, the plea be considered as confessing the words to have been used as those of the defendant himself, making a substantive allegation of his own, it does not contain any proper avoidance of the matter so confessed; for if one make such assertion of a slander as his own, it can be no answer, even admitting the latter part of the fourth resolution in Lord Northampton's case to be law, if in the same conversation he add that some one else has also said the same thing. * * *

BUSH v. PARKER.

*Court of Common Pleas. 1834.**1 Bingham's New Cases, 72.*

Trespass, for assaulting the plaintiff, seizing and laying hold of him, pulling and dragging him about, striking him many violent blows, forcing him out of a certain field into and through a pond, and there imprisoning him.

Second count for assault and imprisonment.

The defendants pleaded, first, not guilty; and then, as assistants of John Powell, justified the assaulting, seizing, and laying hold of the plaintiff, and a little pulling and dragging him about, on the ground that the plaintiff was unlawfully in a close of John Powell's and refused to go out when civilly requested.

The jury having found Parker and John Powell guilty on the general issue, with 5*l.* damages, and having found a verdict for the defendants on the residue of the record,

Ludlow, Serjt., moved to enter up judgment for Parker and Powell, notwithstanding the verdict against them on the general issue, on the ground that the dragging through the pond, which was not adverted to in the pleas of justification, was only matter of aggravation; the gist of the action being the assault and battery, which were covered by the pleas of justification. *Taylor v. Cole*, 3 T. R. 297; *Dye v. Leatherdale*, 3 Wills. 20; *Gates v. Bayley*, 3 Wills. 313; *Fisherwood v.* cited *Cannon*, 3 T. R. 297; *Stammers v. Yearsley*, 10 Bingham. 35; *Cheasley v. Barnes*, 10 East, 73.

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TINDAL, C. J.: I agree in the rule of law as laid down by the counsel for the defendants, that where in trespass a defendant pleads a justification, going to the gist of the action, it is not necessary to include that which is mere matter of aggravation. But that brings us to the application of the rule, and to the inquiry whether it will serve the defendants or not. And we have only to look to the pleadings, here, and to apply our common sense to the allegation that the defendants dragged the plaintiff through a pond, to see that it is a distinct and substantive trespass, and not part of the assault of which the plaintiff first complains. He al-

leges that the defendants assaulted, seized, and laid hold of him, pulled and dragged him about, struck him many violent blows, forced him out of a certain field, into and through a pond, and there imprisoned him. It does not appear where the pond was, whether in the field or not. However, waiving that, how much do the defendants justify? The assaulting, seizing, and laying hold of the plaintiff, and a little pulling and dragging him about, altogether omitting to notice the allegation in the declaration, that the plaintiff was forced through a pond. The question is, whether this was a separate and distinct trespass, or a mere aggravation of the original assault; and it is plain that this was one link in a chain of trespasses following each other, and not a mere aggravation of the first assault. If that assault were alone the gist of the action, and justifying the gist were to be considered a justification of all that followed, we might suppose a case in which, after the assault, the assailant might throw his adversary over a precipice and break his arm. Would that, which stands on such distinct grounds, be justified by any answer to the assault? From one assault to another it might proceed to a contest in which the life of the plaintiff might be at stake. In like manner, as the outrage in question is no part of the trespass included in the justification, and would have required a distinct statement of facts to justify it, it is not covered by the defendants' plea. * * *

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GASELEE, J.: I am also of opinion that this was a substantive trespass, and is not covered by the plea. If, in such cases, we were to say that the whole is one transaction, and covered by a plea justifying a single assault, much would remain unanswered. Suppose a case of assault, and dragging the party assaulted, in handcuffs, through the streets to a place of confinement: could a defendant justify that by pleading that he arrested the party for a debt?

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BOSANQUET, J. * * *

The defendants profess to justify the assault, battery, and pulling and dragging about; and then contend, because they have justified that, that the dragging through the pond is only part of the manner in which the trespass was committed. That is not a reasonable construction of the decla-

ration. The defendants have pointed out their justification to the battery only, leaving the affair of the pond unanswered; and, as that was also a substantive trespass, the plaintiff ought to retain his verdict.

Rule discharged.

HURST v. COOK.

Supreme Court of New York. 1838.

19 Wendell, 463.

Demurrer to plea of property in a third person in an action of trover. The plaintiff, John Hurst, declared in trover, for the taking and conversion of certain goods and chattels belonging to him. The defendant pleaded that he as a deputy of the sheriff of Onondaga, by virtue of two executions against one Thomas Hurst, for the purpose of satisfying the same, took the goods and chattels specified in the declaration, "the same then and there being the property of the said Thomas Hurst." To which plea the plaintiff demurred, assigning as special causes of demurrer, that the plea amounted to the general issue.

*By the Court, COWEN, J. * * **

It must be admitted that the books are studded with special pleas in the action of trover, even such as shew that the plaintiff never had any cause of action. They set up either property out of the plaintiff, or admit that it belonged to him, and insist that the defendant lawfully took and converted it: as that he distrained or took it in execution, or that he never did convert the property, and the like. Many such pleas have passed without being met by a special demurrer. * * *

* * * * *

Most of the cases, however, ancient and modern, have overruled such pleas, on the point of their sufficiency being raised by special demurrer, assigning for cause that they amounted to the general issue. * * *

At a time when the judgments at Westminster Hall stood in singular conflict, and their reasoning and *dicta* on the subject of these special pleas in trover exhibited contra-

dictions and subtleties no less extraordinary, as may be seen on a still closer examination of the cases, the courts adopted and have since steadily pursued, if they have not extended the doctrine of that line of authority which, taken together, was found to repudiate all special pleas in trover going to the original cause of action. * * *

It is also said in 1 Chitty's Pl. 490, that the defendant may, in trover, plead anything specially which admits property in the plaintiff and a conversion by the defendant. I think he might have added that a special plea shewing either property out of the plaintiff or that there was no conversion, or both, would be bad on special demurrer, as amounting to the general issue. It may be taken as the clear result of the more numerous cases including modern authorities, of the course of which this court strongly intimated its approbation in *Kennedy v. Strong*, 10 Johns. R. 289, that a special plea showing there never was an unlawful conversion of the plaintiff's property, or in other words, that he never had any cause of action, is bad in form. But where the plea admits that there once was a cause of action, and sets up subsequent matter in discharge or avoidance, it may be pleaded specially. The general issue is, not guilty of the premises, etc. In good sense, this denies all which the plaintiff, in legal effect, alleges in his declaration, viz., property in himself and an illegal conversion by the defendant. The evidence on such an issue, so long as it is confined to the original cause of action, comes literally within the scope of the pleadings, as remarked by KING, Ch. J., in regard to other actions on the case: "Everything which shews that the defendant did what he might do, may be given in evidence upon not guilty pleaded; for that proves he had done no injury." Anon. Com. Rep. 274. It is not necessary to say that the defendant must plead even matter in discharge or avoidance. We know that generally he need not, though he may do so in actions of assumpsit, and especially in other actions on the case. 1 Chitty's Pl. 486, and the cases there cited. I have noticed the statute of limitations as a defence, which it is said must be pleaded. So of justification in slander. But I do not now remember any other exception to the rule that, in an action on the case, every matter of defence may be received under the plea of not guilty. In *Bird v. Randall*, 3 Burr. 1353, 1 Black. Rep. 388, S. C.,

Lord MANSFIELD made no exception. Of course I speak of pleas in bar, not in abatement.

* * * * *

I presume the general issue has been pleaded, though very properly omitted in the demurrer book. If so, no amendment is necessary. If otherwise, the defendant may now add the general issue.

Judgment for the plaintiff.

HUNTER v. HATTON.

Court of Appeals of Maryland. 1846.

4 Gill, 115.

This was an action of trespass *q. c. f.*, brought on the 16th February, 1844, by the appellant against the appellee, for a forcible entry into, and expulsion from a tract of land called Boarmans Content.

The defendant, H. D. H., pleaded, 1st, *non cul.*

2d. That the *locus in quo*, etc., is, and at the time was, the proper soil and freehold of the said H. D. H., wherefore he entered, as it was lawful for him to do.

The defendant, G. K., pleaded *non cul.*

The plaintiff joined issue on the general issue; and as to second plea of H. D. H., replied, that the matters and facts therein alleged, are not true, etc.

1st Exception. At the trial of this cause the plaintiff to maintain the issues on his part, proved that some short time before the institution of the present suit, the plaintiff was in the possession of the land and premises in the declaration mentioned, called Boarmans Content, claiming title to the same; and that he was engaged in the repairs of the dwelling situated on said land, on the 3rd February, 1844. That during the night of that day, the said dwelling house was forcibly entered, and broken open by some person or persons, and that on the next morning, when the witnesses went to the said house, they found the defendants in the possession of the said house. That the defendants told the witnesses that they had taken possession of the said house and premises, and that they meant to keep

possession. The defendants had with them, at that time, guns, and threatened to shoot the servants of the plaintiff if they came upon or crossed the said land. The said witnesses also proved, that the said defendants kept possession of the said house and premises for eight or ten days, refusing to suffer or permit the plaintiff or his servants to enter thereon.

The defendants then, for the purpose of maintaining the issues on their part joined, proved to the jury, that the said land and premises was formerly the property of Gustavus Brown, deceased, father of Mary E. Brown, the present wife of the defendant, Hatton; that Gustavus Brown died intestate in 1830, seized of the said land, leaving Mary E. Brown, now the wife of the defendant Hatton, his only child and heir at law, who intermarried with the said defendant, Hatton, in the year 1838.

The plaintiff then, further to maintain the issues on his part joined, offered to prove, that after the death of the said Gustavus Brown, the said land was sold by a decree of Prince George's county court, sitting as a court of equity, as the estate and for the benefit of the said Mary E. Brown; and offered to prove that the same was, at that sale, purchased by one Joseph Hatton, who subsequently sold it to the plaintiff, and for that purpose offered to read to the jury, the following record of a decree in Prince George's county court, and all the proceedings therein.

[This record showed that on December 12, 1837, a petition was filed in the Prince George's County Court, on behalf of Mary E. Brown, an infant, for the sale of the said land called Boarmans Content, and that a decree was made ordering its sale by Gustavus Brown as trustee, on two years' credit. On October 14, 1841, H. D. Hatton and Mary E., his wife, filed a petition alleging that a pretended sale of the land had been made to Joseph Hatton, but the same had not been reported to the court or ratified, that no part of the purchase money had been paid, that the trustee was dead and Joseph Hatton insolvent and praying for a new trustee and a resale. Joseph Hatton answered that he had been let into possession of the land, had given a bond with security for the purchase money, and had sold the land to Peter D. Hatton who had been in possession ever since, and prayed for the appointment of a trustee to convey the land to Peter D. Hatton, who was willing to pay as

soon as he could get title. On July 8, 1844, Robert W. Hunter filed a petition alleging the sale to Joseph Hatton, his purchase of the land from Joseph, his payment of the entire purchase money to H. D. and Mary E. Hatton with the consent of Joseph, and praying that he be substituted for Joseph as purchaser, the sale ratified and a new trustee appointed to convey. A decree was made pursuant to this prayer, and Thomas F. Bowie was appointed trustee to complete the trust.]⁴⁹

The plaintiff also offered in evidence the deed of Thomas F. Bowie, as trustee under the decrees aforesaid, to R. W. Hunter, for the land decreed to be sold, bearing date 9th September, 1844, duly acknowledged and recorded.

But the defendants objected to the admissibility of the said record and deed. * * *

* * * The court (A. C. MAGRUDER, C. J.) sustained the objections. * * * The plaintiff excepted.

* * * * *

DORSEY, J., delivered the opinion of this court.

The defendants in this case severed in pleading; Kendrick relying on the general issue plea of not guilty, only; and Henry D. Hatton, in addition to the general issue, having pleaded *liberum tenementum*. Issues were joined upon the pleas of not guilty; and to the plea of *liberum tenementum*, the replication contained nothing more than a general traverse of the facts contained in the plea.

On the trial, the plaintiff having proved his actual possession of the close on which the trespass is alleged to have been committed; and the defendant, Hatton, having proved a freehold interest therein, *jure uxoris*, the plaintiff offered in evidence a record of certain proceedings on the equity side of Prince George's County Court, instituted in 1837 (whilst she was sole and an infant), for the sale of her real estate, descended to her from her father, it being the freehold in controversy in this case; and also the deed of conveyance thereof, of the trustee to the appellant.

The admissibility of this evidence being objected to, a great variety of grounds have been relied on by the appellees in support of the objection. If the testimony were admissible for none of the purposes for which it was of-

49. Condensed statement of part of the facts by the editor.

ferred, by reason of any of the causes assigned in the court below for its rejection, or which can be urged here, then must the decision of the county court in the first bill of exceptions be sustained.

* * * * *

But it is alleged that the conveyance by the trustee to the purchaser, being several months posterior to the trespass for which the present action was brought, that although it were conceded that the appellant was rightfully possessed of the land, and entitled to hold such possession adversely to the appellee, Hatton, the owner of the freehold, yet, that in the present state of the pleadings, such right of possession in the appellant, formed no part of the issue on the plea of *liberum tenementum*; and, therefore, upon the issue joined thereon, no evidence could be admitted to prove such mere right of possession in the appellant; that if intended as an answer to the plea of *liberum tenementum*, it should have been specially pleaded by way of replication. And when regarding the title of the appellant as a mere right of possession, the objection to the admissibility of the record offered in evidence should have been sustained. *Liberum tenementum* is a plea interposed by a defendant, for the purpose of trying his right to the freehold; it is not an absolute denial of all colorable right to possession by the defendant.

The opinion of Lord DENMAN, C. J., in *Doe v. Wright*, 37 Eng. C. L. R. 231, does not, as has been asserted, clearly show, that upon the issue joined in this case on the plea of *liberum tenementum*, the superior possessory right of the appellant can be given in evidence. His lordship says, "It is necessary to settle what is the true meaning of *liberum tenementum*; what it admits, and what it denies. Now if it is pleaded in answer to a possessory action, it must admit a possession in the plaintiff, or it would be bad, as amounting to the general issue. It must admit such a possession as would suffice to maintain the action if unanswered, or as against a wrongdoer. On the other hand, it must deny a rightful possession, or it would fail as a defence to the action. In the language of pleading, it gives implied colour to the plaintiff, but asserts a freehold in the defendant, with a right to immediate possession. In an ordinary case, therefore, such a plea is answered, by replying a term of years in the plaintiff created by the defendant, which

shews that the plaintiff's possession is not merely colorable but rightful." Such a replication admits the freehold in the defendant, and only asserts a right of possession in the plaintiff. On an issue upon such a replication, the question to be tried by the jury would be the plaintiff's right of possession. But what is the matter to be tried under the issue in this case, on the plea of *liberum tenementum*? Whether the freehold be in the defendant? The jury, upon finding that fact, have nothing to do with the right of possession. The plaintiff's traverse of the plea admits the defendant's right to the possession, should the jury find him entitled to the freehold. These views, it is believed, are sustained by *Thompson v. Hardinge*, 50 Eng. C. L. R. 940, where MAULE, J., says, "The plea of *liberum tenementum* does not assert a freehold interest only, but present freehold, a right of immediate possession as against any other freehold." And COLTMAN, J., who delivered the opinion of the court in that case, said, "We are of opinion, that if the freehold is in the lord, the tenant's interest must be of a subordinate nature, and must be replied, on the same principle on which a term of years must be pleaded in answer to a plea of *liberum tenementum*." And in 1 Chit. Pl. 503, it is thus stated: "In observing upon the qualities of pleas, we shall hereafter see that a special plea in trespass, which claims for the defendant a possessory right, and yet does not give the plaintiff express color, is bad, because it amounts to the general issue, and violates the principle that a plea must deny or confess and avoid the matter alleged in the declaration. A plea of *liberum tenementum*, is free from this objection, because it gives apparent color, as it is not absolutely and manifestly inconsistent therewith, that the plaintiff might have had some inferior leasehold or minor title, in respect whereof he might have had possessory right or title, or at least, possession." And in treating of the plea of *liberum tenementum*, it is stated: "Thus if the defendant be in reality the freeholder, so that the plaintiff cannot with safety deny the plea he is driven to admit its truth, and to deduce a title from the defendant, as that he demised the close to the plaintiff," etc. And in page 595, "if the plaintiff derive title under the defendant, then he must not traverse his plea; but confessing the defendant's title, must reply the lease, or some other title under him, concluding with a verification."

But although the record, apart from the deed of conveyance by the trustee, is not under the pleadings in this cause, admissible in evidence of the possessory right thereunder acquired by the plaintiff, yet when offered with such deed of conveyance, it is competent testimony to go to the jury to shew that the freehold, in the premises in question, is not in the defendant, but in the plaintiff. It is true, the present action was instituted on the 16th day of February, 1844, a few days after the commission of the trespass complained of; and that the deed of conveyance from the trustee to the appellant, bears date on the ninth day of September of the same year, some months after both the cause and commencement of the present action. This deed, however, does not operate to pass the freehold, merely from the time of its execution; but being a conveyance under a judicial sale, upon the principles of relation, it operates retrospectively, and vests the freehold estate in the premises, in the grantee from the date of the sale; and therefore disproves and defeats the plea of *liberum tenementum*, by shewing that, by operation of law, at the time the trespass was committed, the freehold was in the plaintiff. See Viner's Abr., tit. Relation, 290, and *Jackson v. Ramsay*, 3 Cowen, 75, and the cases therein referred to.

It hence follows that the county court erred, in refusing to permit the record and deed offered in evidence, in the first bill of exceptions, to be read to the jury.

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DUNLEVY v. FENTON.

Supreme Court of Vermont. 1908.

80 Vermont, 505.

Assumpsit for breach of a marriage promise. Heard on special demurrer to plaintiff's replication to defendant's sixth special plea, at the September term, 1907, Windham County, HASELTON, J., presiding. Demurrer overruled and replication adjudged sufficient. The defendant excepted. The opinion states the substance of the pleadings in question.

• • • • •

MUNSON, J.: The plea alleges in substance that the plaintiff by her deed in writing under her hand and seal released and discharged the defendant from the cause of action sued upon, and covenanted and agreed that at the next succeeding term the suit should be entered "settled and discontinued," and makes profert of said deed.

The replication alleges in substance that the plaintiff made said supposed deed of release and delivered it to one Garceau, on condition and in consideration that the defendant then promised that he would make and deliver to the plaintiff a like deed of release discharging the plaintiff to the same extent, and would deliver to the plaintiff the pleas prepared in the case, and would leave five hundred dollars with Garceau for the plaintiff by a time stated, and that both parties should treat such agreement as strictly confidential; and alleges further that the parties were to meet at Garceau's office at the time stated, and that Garceau was then to deliver said money to the plaintiff and said supposed deed of release to the defendant, but that said deed was not to be of any force until defendant had fully complied with every condition of said agreement; and alleges further that the terms of said agreement were made public by defendant; that said pleas were not delivered to the plaintiff but were filed in court, and that neither the defendant's release nor said sum of money was delivered to the plaintiff; that plaintiff was at Garceau's office at the time named and was then informed by Garceau that the defendant had not left said money as agreed, and that plaintiff waited some time without the defendant appearing, and then demanded of Garceau the return of her said supposed deed of release, but that Garceau refused to return it, and afterwards delivered it to defendant's attorneys against her protest, and that the supposed deed pleaded by defendant is not her deed of release; concluding with a verification.

The replication is demurred to; and special causes of demurrer are assigned, which are in substance, that it does not answer the plea, either by a general form of denial or by a denial of any single material fact; that it advances new matter, and thereby sets forth a contract different from that stated in the plea, and so amounts to the general issue; and that it does not confess and avoid any material allegation of the plea.

* * * * *

The plaintiff argues that the replication is a proper plea of confession and avoidance; that the matters set up in avoidance were not coincident with the execution of the release, but occurred after its execution, and so constitute no impeachment of its original validity; that the release became inoperative by reason of these subsequent occurrences, and that matters of avoidance thus arising may be specially pleaded.

It should be noticed at the outset that the matters set up as occurring subsequently to the execution of the release are not matters that arose independently of the contract as the replication alleges it to have been made. These subsequent occurrences, as alleged, were merely breaches of an agreement under which the deed of release was made and deposited. The replication alleges a delivery to a third person to be held for delivery to the defendant when certain conditions were complied with, and a possession wrongfully obtained without such compliance, and avers in conclusion that such supposed deed of release is not the plaintiff's deed.

A plea of confession and avoidance must at least give color to the matter to which it is applied; that is, it must so far confess the matter adversely alleged as to give the opposite party an apparent right—it must contain at least an implied admission that the allegations to be avoided are true. *Dunklee v. Goodenough*, 65 Vt. 257; *Baker v. Sherman*, 75 Vt. 88. It follows that a plea of confession and avoidance which in effect denies the existence of the claim it opposes is defective. The plea rests upon the confession, for if there is no such adverse claim there is nothing requiring new matter in avoidance. Connected with this rule, and largely depending upon it, is the doctrine that a special plea amounting to the general issue is bad. 1 Chitty, 526. A plea which sets up in reply a different contract from the one alleged is bad for this reason. It is an argumentative denial of what the adverse pleader must prove to sustain his claim. *Kimball v. Railroad Co.*, 55 Vt. 95; *Hayelden v. Staff*, 5 A. & E. 153.

The allegation of the replication that the plaintiff made the supposed deed of release pleaded by the defendant is not sufficient to give color. The plaintiff's brief proceeds upon the theory that the deed of release went into effect and was made inoperative by subsequent occurrences, but

the allegations of the replication show that the deed never became operative. The replication sets forth a contract which led to the preparation of a deed of release, but the contract as set forth is entirely inconsistent with the existence of the release as the defendant claims it. When a deed is deposited with a third person to be delivered to the grantee only upon the performance of some condition precedent, and the depository delivers it without the performance of the condition, there is no delivery in law, and the deed is without effect. *Stiles v. Brown*, 16 Vt. 563. We hold the replication insufficient. * * *

CITY v. MANUFACTURING COMPANY.

Supreme Court of Tennessee. 1893.

93 Tennessee, 276.

WILKES, J.: The only question of importance in this cause is whether the statute of frauds can be relied upon under the general issue, or whether it must be specially pleaded by the defendant, in order that he may obtain the benefit of the same. The decisions are uniform that the statute must be set up in the pleadings, and its benefits claimed in all cases where, in fact or in law, the defendant admits making the alleged contract, otherwise the defendant will be held to have waived the benefit of it.

In many of the States of the Union, and in England until the making of the late rules under the Judicature Act, it was held that a denial of the agreement set up places the burden of proving it upon the plaintiff, and he must sustain it by proper evidence, and the objection that parol evidence is insufficient may be interposed at any time. See the cases cited and collated in 8 Am. & Eng. Enc. Law, p. 747; *Hotchkiss v. Ladd*, 86 Am. Dec. 682; *Talbot v. Bowen*, 10 Am. Dec. 747; *Wynn v. Garland*, 68 Am. Dec. 191.

On the other hand, it is held in many of the States that a failure to plead the statute specially is held to be a waiver of its benefit, and a consent that the agreement may be proven by parol. It has been so held in Alabama, Arkansas, Illinois, Missouri, Maine, Massachusetts, and other

States. See *Brigham v. Carlisle*, 78 Ala. 243; *Gwynn v. McCauley*, 32 Ark. 97; *Illinois Coal Co. v. Leddell*, 69 Ill. 639; *Gorden v. Madden*, 82 Mo. 193; *Farrell v. Tillson*, 76 Maine, 227; *Graffam v. Pierce*, 143 Mass. 386, and other cases.

We consider the question an open one under our decisions.

* * * * *

At the present time our holding is that such contracts are voidable merely, at the option of either party, and not void. See *Brakefield v. Anderson*, 3 Pickle, 606.

In view of this holding, we are of opinion the better practice is to require the statute of frauds to be specially pleaded whenever it is desired to rely upon it as a defense. To allow the defendant to proceed with his defense and speculate upon his chances of a successful opposition until a large bill of cost has accumulated, and then, when he finds the chances against him, to permit him to interpose the statute, would be an unreasonable advantage to him at the expense of the plaintiff. If the contract is voidable under the statute, and the defendant intends to rely upon that fact and avoid it, it is but just that he should so notify the plaintiff, to the end that the litigation may end. If he does not rely upon the statute in his pleading, it is but just that the contract be enforced.

The mere denial of the execution of the contract is not equivalent to denying its validity and legality, since the contract may have been made, and still be invalid and voidable under the statute.

The judgment of the court below is reversed, and appellee will pay the costs of the appeal, and the cause is remanded to the court below for a new trial. The costs of the court below will be adjudged by that court.⁵⁰

50. *Accord*:—"SPENCER, J. * * * But upon principle, the plea [of the statute of frauds] is well pleaded, if the promise laid in the second count, is not a valid promise, unless it be in writing. The rule is this, in an action of *assumpsit*, matter which shows that no contract was made, cannot be pleaded; but matter which admits the contract as laid, but shows that it was not binding in point of law, may be pleaded, because, it being matter of law, it is proper to show it to the court." *Myers v. Morse* (1818) 15 Johns. (N. Y.) 425.

Contra.—"PARK, B. * * Under the former system of pleading [before the Rules of Hilary term] the plaintiff was required to prove a writing within the statute of frauds. This must have been in order to support some allegation of his declaration, and there is no allegation, except that of the making

of the contract, which it supports. This allegation is still put in issue by the plea of non-assumpsit." *Buttemere v. Hayes* (1839) 5 M. & W. 456.

In *Ruggles v. Gatton* (1869) 50 Ill. 412, it was held that the defense was available either by special plea or in evidence under the general issue.

KANSAS CITY, MEMPHIS AND BIRMINGHAM RAILROAD COMPANY v. CROCKER.

Supreme Court of Alabama. 1891.

95 Alabama, 412.

WALKER, J.: It is insisted in the application for a rehearing that the defense of contributory negligence could be made under the general issue. The scope of that plea is prescribed by the statute. It puts in issue "all the material allegations of the complaint." Code of 1886, sec. 2675. Of this statutory plea it was said in *Petty v. Dill*, 53 Ala. 645: "It cast on the plaintiffs the *onus* of proving every material allegation of the complaint; it limited the defense to evidence in disproof of them. No matter in avoidance of the allegations of the complaint, or in excuse or justification of the wrongful act imputed to the defendant, was within the issue found. All such matters the statute required to be specially pleaded. * * * If it was intended to confess and avoid, * * * the matter of avoidance should have been specially pleaded. The general denial of the allegations of the complaint was not sufficient to put it in issue." It is well settled, that any defense, special in its nature, or reaching beyond a mere denial of the material allegations of the complaint, is required by the statute to be presented by a special plea. *Howland v. Wallace*, 81 Ala. 238; *Daniel v. Hardwick*, 88 Ala. 557; *Slaughter v. Swift*, 67 Ala. 494. The question, then, is, does a statement of a cause of action based upon the charge that the defendant was negligent, involve the assertion that no negligence on the part of the plaintiff proximately contributed to the injury of which he complains, so that a mere denial of the allegations of the complaint casts the burden on the plaintiff to show that he was not guilty of contributory negligence? As shown in the opinion already delivered in this

case, this court has several times decided that contributory negligence is in its nature defensive, and that it is not incumbent on the plaintiff in the first instance to negative the defense either in his pleading or in his proof. Contributory negligence is none the less defensive because the proof of it is disclosed in the evidence which the plaintiff himself offers in support of the charge that the defendant was negligent. The ruling in *North Birmingham Street Railway Co. v. Calderwood*, 89 Ala. 254, that the burden of proving contributory negligence is not on the defendant when it is shown by the evidence introduced by the plaintiff, has not been adhered to. The rule on this subject which we regard as correct is thus stated in a later case: "The *onus* in this regard is in all cases on the defendant, though plaintiff's evidence sometimes relieves from the necessity of discharging it." *Geo. Pac. Railway Co. v. Davis*, 92 Ala. 312. The defendant need not introduce evidence in support of a special plea, if the evidence introduced by the plaintiff has already established the defense. But the source from which the evidence to support a defense comes does not determine that it was not purely defensive matter, and available only under a special plea, or that the burden to prove it was not on the defendant. The term "contributory negligence," instead of implying such a denial of the material allegations of the complaint as is made by pleading the general issue, implies just the contrary. The theory of this special defense is, that the defendant was negligent, but that the negligence of the plaintiff conduced to the injury complained of. The defense is in the nature of a confession and avoidance. It may be fully made out without denying a single allegation of the complaint. The pith of it is, that admitting that the defendant was negligent as charged, yet the plaintiff is not entitled to recover because his own negligence proximately contributed to the injury. The plea of contributory negligence, when standing by itself, admits the negligence charged in the complaint. *L. & N. R. R. Co. v. Hall*, 87 Ala. 708; *Carter v. Chambers*, 79 Ala. 229; *Geo. Pac. Railway Co. v. Lee*, 92 Ala. 270. Now, the very essence of the general issue is a denial of all the material allegations of the complaint. When negligence is counted on, the fact of negligence is certainly denied by the general issue. The same words cannot at once be a denial and an admission of the

same thing. The statutory general issue does not palter in a double sense. It does not admit what it denies. True, it was said in *Government St. R. R. Co. v. Hanlon*, 53 Ala. 70, that the defense of contributory negligence was available under the general issue. The statement of this proposition was not necessary to the decision in that case. It is stated in the report that the record did not disclose upon what pleas the case had been tried. Such being the case, as it appeared that the defence of contributory negligence was considered without objection on the trial, it could have been presumed, in favor of the correctness of the rulings of the lower court, that the defense was presented by a special plea. *Brinson v. Edwards*, 94 Ala. 447. The proposition, however, that the defense of contributory negligence could have been availed of under the general issue, was simply asserted without discussion or argument, and the only authority cited in support of it was *Steele v. Burkhardt*, 104 Mass. 59. The ruling of the Massachusetts court in the case cited is put upon the ground that the plaintiff's allegation that the injury happened in consequence of the negligence of the defendant implies that there was no negligence on the part of the plaintiff which contributed to the injury, and throws upon him the burden of proving that he was free from such negligence. It is now well settled in this State that no such implication is involved in the plaintiff's allegation that the defendant's negligence caused the injury, and the burden is not primarily on the plaintiff to negative fault on his part. During the sixteen years that have elapsed since the case above cited from 53 Ala. was decided, many phases of the defense of contributory negligence have been passed on by this court. The proposition that that defense is available under the general issue has not been reaffirmed. This court has declined to reaffirm the proposition. *Montgomery & Eufaula R. Co. v. Chambers*, 79 Ala. 342. In *Rich & Danv. R. Co. v. Hammond*, 93 Ala. 181, it was distinctly recognized, that the defense is one requiring a special plea to support it. As the nature of the defense has been brought out in clearer light in the later decisions, its distinctive character as a special defense has been fully established. A defense which in its very nature concedes the truth of the charge against the defendant, but avoids the effect of the concession by making a counter charge against the plaintiff,

cannot reasonably or logically be availed of under a plea which limits the defendant to evidence in disproof of the charge made in the complaint. We adhere to the ruling that the defense of contributory negligence must be made by a special plea. On this point the case of *Government St. R. R. Co. v. Hanlon*, *supra*, must be overruled.

* * * * *

BRIDGE v. THE GRAND JUNCTION RAILWAY
COMPANY.

Court of Exchequer. 1838.

3 Meeson & Welsby, 244.

Case. The declaration stated, that, before and at the time of the committing of the grievances thereafter mentioned, to-wit, on the 9th September, 1837, the plaintiff was a passenger by a certain carriage forming part of a certain train of railway carriages then being on a journey on and by a certain railway, to-wit, the Liverpool and Manchester Railway; and the said company was also then possessed of a certain other train of railway carriages then also journeying on and by the said railway, under the care and management of certain servants of the said company; nevertheless the said company by their said servants, so carelessly, negligently and improperly behaved and conducted themselves in and about the management, control, and direction of the said train of the said company, that the same, by and through the default, carelessness, negligence and improper conduct of the said servants of the said company, then with great force and violence ran upon and against the said train of carriages, in one whereof the plaintiff then was being carried as aforesaid, and struck against the same, by means whereof the said last-mentioned train was very much injured, and the said carriage on which the plaintiff then was, was driven in, broken to pieces, and destroyed, and thereby three of his the plaintiff's ribs were fractured and broken, and he was otherwise greatly wounded, bruised and injured, etc.

Plea, that, before and at the time of committing the grievances in the declaration alleged, the said train of carriages, in one whereof the plaintiff was a passenger, did not belong to the defendants, nor was the same under the care and management of the defendants or of their servants, but under the care and management of other persons; that before and at the time when, etc., in the declaration mentioned, the said train of railway carriages of the defendants was lawfully proceeding on the said railway, and that the persons who had the management, control, and direction of the said train of carriages, in one whereof the plaintiff was then being carried, carelessly, negligently, and improperly behaved and conducted themselves in and about the management, control and direction of the same, and that, in part by and through the default, carelessness, and negligence, etc., of the last-mentioned persons, as well as in part by and through the default, carelessness, and negligence, etc., by or on the part of the servants of the defendants in and about the management, etc., of the said train of carriages of the defendants, the said train of carriages of the defendants ran upon and against the said train of carriages, in one whereof the plaintiff was then being carried, and struck against the same, and occasioned the damage, injuries, etc., in the declaration mentioned. Verification.

Special demurrer, assigning the following causes: that the plea amounts to not guilty. * * *

* * * * *

PARKE, B.: The plea undoubtedly amounts to the general issue. * * *

SECTION 2. PLEAS IN ESTOPPEL.

CITY OF EAST ST. LOUIS v. FLANNIGEN.

Appellate Court of Illinois, Fourth District. 1889,

34 Illinois Appellate, 596.

REEVES, J.: The city of East St. Louis brought this suit against Alexander Flannigen and the other appellees, on his bond as treasurer of said city. The declaration avers

the appointment of Flannigen as treasurer, on the 20th day of April, 1886, and the execution of the bond sued on. The declaration sets forth the ordinance of said city defining the duties of the treasurer, and alleges that on the 31st day of August, 1886, the city council passed its annual appropriation ordinance, by which the sum of \$113,056 was appropriated to be applied as follows: * * *

On the 14th day of September, 1886, the city council passed an ordinance for the annual tax levy of \$64,129, which amount was declared to be to defray the expenses of said city for the year 1886, as provided by the appropriation ordinance for the fiscal year beginning July 1, 1886, as follows, to-wit: * * *

The declaration further avers that there came into the hands of said Flannigen, as treasurer of the funds belonging to fiscal year 1885, the sum of \$28,494.74, and afterward at divers times between July 1, 1886, and April 14, 1887, there came into his hands of the funds of said city for the fiscal year 1886, the following sums, to-wit: * * *

All of which, except the sum of \$20,000, came into his hands after the adoption of the appropriation ordinance aforesaid, and was subject to the classification and distribution by said ordinance provided, and that it was the duty of said treasurer to so classify and distribute the same. * * *

Four breaches were assigned.

First. That Flannigen did not classify and distribute the moneys coming into his hands as treasurer for the fiscal year 1886, as required by the appropriation and tax levy ordinances, whereby the city suffered \$5,000 damages.

* * * * *

Nineteen pleas were filed by the defendants. The 1st, 2nd, 3rd and 4th were to the first breach; the 5th, 6th, and 7th were to the second breach; the 8th, 9th, 10th, 11th and 12th were to the third breach; the 13th, 14th and 15th were to the fourth breach; the 16th, 17th and 18th to the declaration, and the 19th plea to the third and fourth breaches.

To the 1st, 6th, 8th, 9th, 10th, 11th, 13th, 14th, 16th, 17th and 19th pleas a demurrer was interposed and to the remaining pleas replications were filed. The demurrer to the pleas named was overruled, and the plaintiff stood by its demurrer, and as the 16th and 17th pleas purported

to answer the whole declaration there was judgment on demurrer for defendants, from which this appeal is prosecuted. The errors assigned are that the circuit court erred in overruling the demurrer to pleas, in rendering judgment for defendants and in not sustaining the demurrer to pleas. So it will be seen that the question presented for our consideration is whether the court properly overruled the demurrer to the several pleas named above. The first plea is to the first breach hereinbefore set forth, and is in substance that the defendant Flannigen, as treasurer, on the 13th day of April, 1887, made full and complete report, and submitted the same to the city council, showing the moneys received by him as such treasurer and the disbursement thereof, and the city council with full knowledge of all the facts, then and there approved said report and confirmed and ratified the disbursements made by him as treasurer, and then and there approved of the manner in which said Flannigen had kept the account of said city, and this the defendants are ready to verify, etc. It would seem, if this plea can be sustained at all, it must be as a plea of estoppel.

A plea in estoppel neither denies the allegations of the opposite party as in a plea of traverse, nor admits them as in a plea of confession and avoidance, but alleges some new matter which precludes the opposite party from making the allegations contained in his declaration. Steph. Pl., 219, 220; Gould Pl., 39 to 42. This plea is recognized as a distinct plea to the action, and is not, technically speaking, a plea in bar, which must either deny or admit and avoid the allegations of the declaration (1 Chitty, 551); but as it is a plea to the action it is usually spoken of as a plea in bar. Without denying any of the facts alleged in the breach, it avers that with full knowledge of all the facts as to the manner in which Flannigen kept his books as treasurer and as to how he had paid out the moneys referred to in this breach, the city council approved and ratified what had been done, and the legal principle underlying the defense claimed is, that with such full knowledge of all the facts the city, by its council, ratified and approved what had been done and is now estopped from alleging that these payments were not properly and legally made. As a plea of estoppel it is defective in form and substance. This plea, without confessing or denying the matter of fact

adversely alleged, relies merely on some matter of estoppel as ground for excluding the opposite party from the allegation of fact. Like pleadings in abatement, this plea has formal commencement and conclusion to mark its special character and quality and to distinguish it from an ordinary plea in bar. Stephens on Pleading, 219 and 220. It would seem at common law, this defect of want of formal commencement and conclusion of the plea could be reached by a general demurrer, and this rule was not changed until the Statute of 4 and 5 Anne, which is not in force in this State.

But if we concede that under our statute and practice this defect could only be reached by special demurrer, there is another defect in this plea which may be reached by general demurrer. It is a necessary averment in a plea of estoppel that the new matter in the plea shall be relied on as estoppel and so pleaded. Co. Litt., 303 b, Com. Dig.; Pleader E. 31; Estoppel E.; 1 Saund. 325a, note (4); *Shelly v. Wright*, Willis, 13; Steph. Pl., 2d Ed. 443. As has been seen, this is not a plea of discharge, for that is a plea of confession and avoidance.

* * * * *

*Reversed and remanded.*⁵¹

51. *Strictness in pleading estoppels.* Lord Coke stated the rule which has since been followed, "that every estoppel, because it concludeth a man to allege the truth, must be certain to every intent." Coke on Littleton, B'k III, ch. VI. The rule seems to have caused little inconvenience, though on principle it is probably wrong. See the discussion on this point by REDFIELD, J., in *Gray v. Pingry* (1845) 17 Vt. 419, where he says that the doctrine of estoppel by former adjudication, "instead of being an odious doctrine, is one of the most salutary and conservative doctrines of the law."

WEBSTER v. STATE MUTUAL FIRE INSURANCE COMPANY.

Supreme Court of Vermont. 1906.

81 Vermont, 75.

POWERS, J.: This case comes before us on the defendant's exceptions to the judgment of the county court overruling the special demurrers to the plaintiff's amended replications to the defendant's third, fourth and fifth pleas.

I. By the third plea, it is alleged that, notwithstanding certain express conditions, stipulations and agreements in the policy of insurance sued upon, the plaintiff failed to give immediate written notice to the defendant, and failed to make proper proofs of loss within the time limited in the policy. To this plea, the plaintiff replies that within the specified time, she, in good faith, gave the defendant a true and accurate list of the property, the value and loss thereon, and offered to furnish the defendant whatever proof thereof it might require; which said list the defendant carried away and kept, without making any objection to the form or sufficiency thereof, either at that time or at any time in season for her to repair the error, if any, therein; and that the defendant then and there "waived the technical, literal requirements of said policy in that respect."

To this replication the defendant demurs specially, on the ground (1) that it neither confesses and avoids nor denies the allegations of the plea. * * *

It is an elementary rule of pleading, as claimed by the defendant, that the pleader, if he does not demur, must either traverse or confess and avoid all the material allegations to which he makes answer. 1. Chitt. Pl. (14th Am. Ed.) 524a; Stephen Pl. (Heard's Ed.) 138. But this rule has no application to pleadings in estoppel. Stephen Pl. 219; Gould Pl. Ch. II, sec. 39. Such pleadings neither confess nor deny the truth of the allegations which they answer, but deny the right of the party to allege the facts. It is said that such pleas are not technically pleas in bar, though like pleas in bar they deny the right of action or defence, by denying the right to assert the facts. *East St. Louis v. Flannigan*, 34 Ill. App. 601. The issue which they present is not to determine the truth or validity of the particular facts pleaded, but the right and power of the party to insist upon them. So if the plea under consideration is a plea in estoppel, it is not open to the first objection specified in the demurrer. The terms "waiver" and "estoppel," as applied to the law of insurance contracts, are usually used as meaning the same thing and they are so used in many of our own cases. Courts have frequently asserted that they are convertible terms, as was done in *Security Ins. Co. v. Fay* (Mich.), 7 Am. Rep. at page 674; *Elliot v. Lycoming County Mut. Ins. Co.* (Penn.), 5 Am. Rep. 28

page 325; *Ins. Co. v. Wolf* (U. S.), 24 L. Ed. 387; *United Firemen's Ins. Co. v. Thomas*, 47 L. R. A. 450. A closer inspection of the matter, however, convinces us that they are essentially different. A waiver involves the act or conduct of one of the parties to the contract, only. An estoppel involves the act or conduct of both parties to the contract. *McCormick v. Ins. Co.*, 86 Cal. 260. A waiver is the intentional relinquishment of a known right. *Donahue v. Ins. Co.*, 56 Vt. 374. It involves both knowledge and intent. An estoppel may arise where there is no intent to mislead. A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position. *Metcalf v. Phenix Ins. Co.* (R. I.), 43 Atl. 541; *Hanscom v. Home Ins. Co.* (Me.), 38 Atl. 324; *Washburn v. Life Ins. Co.* (Ala.), 38 So. 1011; *Queens Ins. Co. v. Young* (Ala.), 11 Am. St. Rep. 51. An estoppel always involves this element. A waiver may amount to an estoppel, but not necessarily so. Though the conduct of the insurer may not have misled the insured to his prejudice, yet if with full knowledge he intentionally elects not to take advantage of the forfeiture, the law in its zeal to avert the forfeiture will hold the insurer irrevocably bound as by an election to treat the contract as if no cause of forfeiture had occurred. And this election may be either express or implied.

We think the replication to the third plea must be considered to set up a waiver rather than an estoppel. It commences with the usual *precludi non* and concludes with a prayer for judgment for damages; while the proper commencement of a replication in estoppel is that "the defendant ought not to be admitted or received to plead" the matter set out in the plea; and it should conclude with a prayer for judgment "whether the defendant ought to be admitted and received, against his own conduct, etc., to plead the plea," etc. *Shelley v. Wright*, Willes, 9, approved in *Gray v. Pingry*, 17 Vt. 419. It lacks an essential element of estoppel—the reliance to her prejudice by the plaintiff upon the conduct of the defendant. The pleader alleges that the defendant "waived" the requirements of the policy, instead of alleging that the defendant is "estopped," apparently having in mind the distinction herein pointed out.

We can see no very good reason why a replication setting up a technical waiver would not be classed with those

setting up a technical estoppel, and so not required by the rules of pleading to traverse or confess and avoid; but we think that this replication does sufficiently confess and avoid by implication, which is just as good as an express confession. *Baker v. Sherman*, 75 Vt. 88, 53 Atl. 330. The question is, whether the language can fairly be construed as an admission of the facts alleged in the plea. *Blood v. Adams*, 33 Vt. 52. As we have seen, the commencement and conclusion are those of confession and avoidance. It is alleged that the defendant did not make objection in season for the plaintiff to repair the error, if any; and that the defendant waived the technical, literal requirements in that respect. This last expression must be taken to mean in respect to the matters set up in the plea. Clearly, these allegations are entirely inconsistent with a denial of the facts in the plea. On the other hand, the whole tenor thereof, fairly considered, implies an admission. See *Mossman v. Bostrich*, 76 Vt. 409, 57 Atl. 995.

* * * * *

VOOGHT v. WINCH.

Court of King's Bench. 1819.

2 Barnwall & Alderson, 662.

[Plaintiff brought an action against defendant for diverting the water in a stream so as to diminish the flow to plaintiff's mill, and the defendant pleaded not guilty. On the trial the defendant gave in evidence the record of a verdict and judgment obtained by him in a former action between the same parties and for the same cause of action. It was insisted at the trial that this judgment was conclusive and operated as an estoppel, but the judge refused to nonsuit the plaintiff.]⁵²

ABBOTT, C. J. * * * Upon the second point I am of opinion that the verdict and judgment obtained for the defendant in the former action was not conclusive evidence against the plaintiff upon the plea of not guilty. It would

indeed have been conclusive if pleaded in bar to the action by way of estoppel. In that case the plaintiff would not be allowed to discuss the case with the defendant, and for the second time to disturb and vex him by the agitation of the same question. But the defendant has pleaded not guilty, and has thereby elected to submit his case to a jury. Now if the former verdict was proper to be received in evidence by the learned judge, its effect must be left to the jury. If it were conclusive indeed, the learned judge ought immediately to have nonsuited the plaintiff, or to have told the jury that they were bound, in point of law, to find a verdict for the defendant. It appears to me, however, that the party, by not pleading the former judgment in bar, consents that the whole matter shall go to a jury, and leaves it open to them to inquire into the same upon evidence, and they are to give their verdict upon the whole evidence then submitted to them. I am aware that in *Bird v. Randall*, 3 Burr 1353, Lord MANSFIELD is reported to have said that a former recovery need not be pleaded but will be a bar when given in evidence. I cannot, however, accede to that; for the very first thing I learnt in the study of the law was that a judgment recovered must be pleaded. That has so strongly engrafted itself on my mind as a general principle, that nothing I have heard in argument this day, has shaken it. I am, therefore, of opinion, that there ought not to be a nonsuit.

BAYLEY J.: I am of the same opinion. * * * An action is here brought, as it is alleged, for the same cause in respect of which a former action had been brought, and in which a verdict was obtained by the defendant. Now a defendant ought not, in point of law, to be twice vexed for the same cause of action; and he would have had a right, if he had thought fit, to have pleaded the former verdict by way of estoppel, and thereby have shewn that the plaintiff was not at liberty to try that question a second time, which had been tried before and decided against him. Instead, however, of putting himself on that estoppel, he merely says, that he is not guilty of the offence imputed to him; and, upon that issue, the jury are to try, not whether the plaintiff is estopped from trying the question, but whether the defendant be guilty or not. Upon that issue, the defendant may prove, that the act imputed was not done by him, and that another jury were of opinion that

he was not guilty; and, for that purpose, he may give in evidence the judgment in the former cause, for the consideration of the second jury. The question, however, for the second jury (when the defendant has chosen to plead the general issue) is, whether the defendant be guilty or not; and the question raised upon that issue, in an action on the case is, whether the plaintiff had or had not any cause of action at the time of the commencement of the suit. Now the judgment for the defendant in a former action for the same cause, does not necessarily prove that the plaintiff has no cause of action. It decides nothing unless by way of estoppel. In *Outram v. Morewood*, 3 East, 346, where the subject was very fully considered, Lord ELLENBOROUGH C. J., in giving the judgment of the court, takes this distinction, and states expressly, that a former judgment, if properly pleaded by way of estoppel, would be conclusive, but if only offered in evidence it would not be so. For these reasons, I am of opinion, that, upon this issue, the judgment in the former verdict was evidence only to go to the jury.

* * * * *

SANDERSON v. COLLMAN.

Court of Common Pleas. 1842.

4 Manning and Granger, 209.

Assumpsit. The first count of the declaration stated, that whereas certain persons using the name, style and firm of Daeniker and Wegmann, on, etc., in parts beyond the seas, to-wit, at Rio de Janeiro, made their bill of exchange in writing, and directed the same to the defendants, and thereby required the defendants to pay that their first of exchange, second and third not paid, to the order of a certain person, therein named and described as A. V. Bahlson, Esq., 600 *l.* sterling, sixty days after the sight thereof; that the defendants, more than sixty-three days before the commencement of the suit, to-wit, on, etc., had sight of the said bill, and then accepted the same, payable at Messrs. Jones, Loyd and Co.; that the said person, so

named and described in the said bill as A. V. Bahlson, Esq., then indorsed the said bill, by and in the name of A. V. Bahlson, to the plaintiffs; of which the defendants then had notice, and then promised the plaintiffs, to pay them the amount of the said bill, according to the tenor and effect of the bill, and of the said acceptance. Breach, non-payment.

* * * * *

First plea, that the said D. and W. did not make the said bills of exchange in the said first and second counts of the said declaration respectively mentioned, or either of them, *modo et forma*.

Replication to the first plea, so far as it related to the first count, that the defendants ought not to be allowed to plead or say, that the said D. and W. did not make the said bill in the said first count of the declaration mentioned, because the plaintiffs say that, at the time when the defendants accepted the said bill of exchange as in the said first count mentioned, the same bill purported to have been made and drawn by the said D. and W., and to have been signed by them as the drawers thereof; and that the plaintiffs, at the time when the last-mentioned bill was so indorsed to them as in the said first count mentioned, had no notice or knowledge that the said bill had not been made by the said D. and W., and they, before the said bill of exchange became due and payable according to the tenor and effect thereof, gave value for the same, upon the faith and credit of the defendants' acceptance thereof. Verification; and prayer of judgment if the defendants ought, contrary to their said acceptance of the said bill in the said first count mentioned, and to their acknowledgment thereby, to be admitted to say that the said D. and W. did not make the said bill in the said first count mentioned.

* * * * *

Special demurrer to the replication to the first plea, so far as it related to the first count, assigning for causes, that the subject-matter of the said replication was matter of evidence only, and did not, by law, constitute an estoppel to the defendants' pleading the said plea to the first count; that the replication was a departure from the first count, wherein it was alleged that D. and W. made the bill therein mentioned, whilst it was admitted by the replication that they did not make any such bill; that the repli-

cation was inartificially and improperly pleaded, and without the certainty required by law in a plea of estoppel, in this, that it did not affirmatively and precisely state, by positive and direct averments, the facts which were necessary to constitute the alleged estoppel, namely, that there was such a bill as that alleged in the said first count, that the defendants did accept such bill, that they had sight of it, and that the acceptance was written upon a part of the said bill, whereon were written the names of D. and W. as drawers.

* * * * *

Joinder in demurrer.

TINDAL, C. J.: The first point in this case is, whether the drawee, after accepting and thereby giving an apparent validity to a bill, has a right, in an action against him as acceptor, to set up as a defence that the name of the drawer was forged, or other matter invalidating the bill. And it appears to me that he has no such right. * * *

The question then arises, whether the plaintiffs can set this up by way of estoppel. It is said that this may be evidence—and even conclusive evidence—against the defendant, but that the plaintiffs cannot avail themselves of it as an estoppel. If, however, we find upon the record, a fact which would have entitled the plaintiffs to a verdict, I do not see why they may not rely upon that fact by way of estoppel. Estoppel may be by matter of record, by deed, and by matter *in pais*. Co. Litt. 352 a. If, by the last branch, it is meant only that the matter may be given in evidence, it would certainly not be pleadable, and ought not to be put on the record. But there seems to be no reason why the meaning should be so confined. No very precise instances are given in the books where matter of this sort has been pleaded. But it is to be remembered that under the old system of pleading, almost every defence might have been given under the general issue; and the plaintiff, therefore, could not have known that a defence would be attempted to be set up which the defendant was estopped from making. Lord Coke in Co. Litt. 352a, speaking of estoppel by matter *in pais*, refers to estoppel by acceptance of rent; and it may be said that this naturally would be matter of evidence; but looking at the whole of the context, he appears to me to be treating it as being on the record, rather than as a matter for the jury.

With regard to the third objection, it appears to be answered by the declaration, which, after setting out each bill of exchange, alleges that the defendants had sight thereof, and then, that is after having had sight of the bill, accepted the same. Upon the whole I think there must be judgment for the plaintiffs.

COLTMAN, J.: I am of the same opinion. Notwithstanding some of the earlier cases, I think it may be taken as settled, that the acceptor of a bill of exchange is not at liberty to shew that it was not drawn by the party who appears to be the drawer. My brother Channell has argued that this is not a matter of plea, but matter of evidence, and that matter of evidence cannot be pleaded. But the meaning of that rule, I apprehend, is, that a party shall not plead facts from which another fact, material to the issue, is to be inferred. But here the defence itself is pleaded. Then it is said that matter *in pais* cannot be pleaded by way of estoppel. *Veale v. Warner*, 1 Wms. Saund. 323 c., is certainly no authority for such a mode of pleading. I think, however, that if a party has a legal defence to that which is set up against him, he cannot be precluded from pleading such defence.⁵³ * * *

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53. See an exhaustive article by Prof. Gordon Stoner on Pleading Estoppel, 9 Michigan Law Review, 484-498, 576-587.

In *Dean v. Crall* (1894) 98 Mich. 591, it was held, overruling earlier cases *contra*, that estoppels *in pais* need not be pleaded, the court saying: "In many instances it is impracticable to plead estoppels, as they first come to light upon the trial, in answer to evidence not anticipated. That is perhaps not true in the two cases named, or in this case; but a case can easily be imagined where the claim of forgery might first come to the knowledge of the plaintiff upon the trial, and if a plaintiff were not convinced of its truth he might not care to amend his declaration if the opportunity were given."

DANA v. BRYANT.

Supreme Court of Illinois. 1844.

6 Illinois, 104.

TREAT, J.: At the October term, 1839, of the Peoria Circuit Court, a judgment was recovered in the name of the people of the State of Illinois against Thomas Bryant,

Charles Ballance, Augustus O. Garrett, John C. Caldwell, and Luther Sears for the sum of ten thousand dollars, the amount of the penalty of the official bond of said Bryant, as sheriff of Peoria county.

At the April term, 1841, in pursuance of the 14th section of the "act concerning sheriffs and coroners" (R. L. 376; Gale's Stat. 655), Giles C. Dana moved the court for a writ of inquiry of damages on said judgment, and suggested several breaches of the bond, the most material of which was, in substance, that at the May term, 1838, of said court, he recovered a judgment against Thomas Phillips for \$373.60; that on the 18th day of March, 1839, a writ of *feri facias* was issued on said judgment and delivered to said Bryant, as sheriff, to be executed; that during its lifetime said Bryant received \$5 by virtue thereof; that on the 18th day of September, 1839, an *alias fieri facias* issued on said judgment, which came to the hands of said Bryant as sheriff, and that on the 18th day of December, 1839, by virtue thereof, he received from said Phillips the whole amount due thereon, which he refused and neglected to pay said Dana. The defendant appeared and pleaded six pleas to the assignment of breaches. A demurrer was sustained to the third, fourth, and sixth pleas.

The first plea denies that a *feri facias* was issued on the judgment on the 18th day of March, 1839, directed to the sheriff of Peoria county to be executed. The plaintiff joined issue on this plea.

The second plea denies that Bryant, as sheriff, received on the 18th day of December, 1839, the amount due on the *alias fieri facias*. On this plea issue was joined.

The fifth plea alleges that the said sum of money was received by said Bryant without any legal authority, and was not received by him as sheriff. To this plea the plaintiff replied by way of estoppel, that the defendants ought not to be permitted to plead said plea, because said Bryant, by his return, indorsed on the *alias fieri facias*, acknowledged that he received said sum of money as sheriff as by the said return, remaining of record, will be seen. The defendant rejoined, *nul tiel record*.

This last issue was heard by the court, and found for the defendants. A writ of enquiry was awarded, and a jury sworn to assess the damages sustained by the plaintiff, by reason of the breaches suggested, who found that the

breaches assigned were true, and assessed the plaintiff's damages at \$509.66.

The defendants entered their motion for judgment on the issue found in their favor by the court, which motion the court sustained, and rendered final judgment for the defendants, although the jury had found for the plaintiff on the other issues.

To reverse that judgment Dana prosecuted his writ of error.

The main question presented for our consideration by the assignment of errors, is whether the defendants, in the finding of the court on the issue of *nul tiel record*, were entitled to judgment.

It is insisted by the defendants, that the replication admitted the truth of all the material allegations of the plea, and that the plaintiff failing to sustain his replication by the production of the record, the defendants were entitled to final judgment. If the replication is to be regarded as an admission by the plaintiff of the facts set up by the plea, the conclusion contended for follows, and the defence was complete. The principle is undeniable, that a defendant succeeding on one plea, which is a complete answer to the declaration, shall have judgment in his favor, in bar of the action.

It is a general rule in pleading, that a party confesses all such traversable allegations on the opposite side, as he does not controvert. The omission by him to traverse material facts alleged by his adversary, is considered as an admission of them. And what he thus concedes on the record, he is not permitted afterwards to contradict.

To this general rule, there are certain exceptions. One of them is in the case of dilatory pleas. Such pleas do not go to the merits of the action, but merely oppose some matters of form to the further progress of the case.

Another exception is in the case of a new assignment. The office of a new assignment is to obviate a difficulty occasioned by the generality of the declaration, and the defendant is required to plead to it anew, leaving out of question the original plea tendered to the declaration.

Again, the rule is not held to be applicable to pleadings in estoppel. A plea in estoppel, instead of confessing the allegations of the opposite party, neither admits them, as in the case of a plea in confession and avoidance, nor de-

nies them, as in the case of a plea of traverse, but alleges some new matter, which being inconsistent with those allegations, precludes the party from availing himself of them. Stephens on Pl. 219, 220; Gould's Pl. 46, 343.

If this be the correct doctrine in relation to this kind of pleading, it would seem to follow necessarily that a party, who has been unsuccessful in pleading an estoppel, is not afterwards precluded from confessing and avoiding, or traversing the allegations of his adversary. The issue presented by the estoppel, is not to determine the truth or validity of the particular facts, pleaded, but the right and power of the party to insist on them as a defence. This is the only question to be decided. If the estoppel is sustained, the other party is concluded from making the allegations he has interposed. If disallowed, the party who has admitted nothing by pleading it, may then present his answer to the allegations. The question seems, therefore, to be a preliminary one, which may not necessarily dispose of the whole case, and should be first decided, when there are other questions of fact to be tried.

In this view of the case, the finding of the court on the issue of *nul tiel record* only decided that the defendants were not estopped by the record from insisting on the allegations of their plea, and did not determine that those allegations were true. The proper judgment on such finding was interlocutory, and not final, concluding the plaintiff from further assertion of his claim. The plaintiff, after this decision against him, should have tendered an issue to the plea, and that issue, with those formed on the other pleas, should have been submitted by the court to the jury for trial together.

The judgment of the circuit court is reversed with costs, and the cause remanded for further proceedings consistent with this opinion.

A petition for a rehearing was filed in this case, which was denied.

Judgment reversed.

SECTION 3. SET-OFF AND RECOUPMENT.

CHANDLER v. DREW.

Superior Court of Judicature of New Hampshire. 1834.

6 New Hampshire, 469.

Assumpsit on a note for \$27.27, made by the defendant, dated October 21, 1831, payable to one T. Chandler, or order, and by him endorsed to the plaintiff.

Upon the trial of the cause at October term, 1833, it appeared, that the defendant made the note, and that it was endorsed to the plaintiff for a valuable consideration on the 15th of March, 1832. It further appeared, that at the time the note was endorsed to the plaintiff, T. Chandler, the endorser was indebted to the defendant on an account in a larger sum than the amount of the note. The defendant, having given notice that he should avail himself of this account, as a set-off in this case, was permitted so to do, and obtained a verdict.

The plaintiff moved for a new trial, on the ground that the account could not be legally admitted as a set-off in this case.

RICHARDSON, C. J., delivered the opinion of the court.

At the common law there was no set-off of the unconnected mutual demands and debts between the parties in an action. Each party had his action to enforce the payment of his claims against the other. The law of set-off, before judgment, is regulated entirely by statute. When the mutual claims of parties have passed into judgments, it is the practice of courts to set off one judgment against another. This practice does not rest upon any statute, but upon the general jurisdiction of courts over the suitors in them. It is an equitable jurisdiction, frequently exercised. 4 D. & E. 123. *Mitchell v. Oldfield*; 4 Bingham, 423, *Bourne v. Bennett*; 8 Pickering, 342, *Barrett v. Barrett*; 14 Johns. 63, *Simpson v. Hart*; 3 East. 149; 1 M. & S. 240.

Our statute of February 8, 1791, provides, that where there are mutual debts or demands between the plaintiff and defendant, one debt or demand may be set against the other. This statute, which is a transcript of the English

statute, with very slight alterations, and is, in substance, the same as the statutes of New York and Massachusetts, is a very beneficial law; is in its nature remedial, and has always received a very liberal construction.⁵⁴

The statute speaks of mutual debts between the plaintiff and defendant. But this has been construed to mean the real, and not merely the nominal plaintiff and defendant.

Thus, if the payee of a note bring a suit in the name of an endorsee, but for his own benefit, the payee is considered as the plaintiff, within the meaning of the statute. 6 N. H. Rep. 28; 4 Greenleaf, 415, *Moody v. Towle*; 4 B. & C. 547, *Carr v. Hinchcliff*; 3 Johns. 263, *Ruggles v. Keeler*; 13 Johns. 9, *Caines v. Brisban*; 10 Johns. 45 and 396; 2 Chitty's Rep. 387, *Jarvis v. Chapple*.

It has been held that equitable debts or demands are within the meaning of the statute. Thus a bond assigned to the defendant, although such assignment gives to the assignee no legal right of action in his own name, is a good set-off. 3 Binney 135, *Murray v. Williamson*; 8 Johns. 152, *Tuttle v. Beebee*.⁵⁵

Where a factor, dealing for a principal, but concealing the principal, delivers goods in his own name, the person dealing with him has a right to consider him the principal, and may set off any claim he has against the factor in an action brought by the principal. 7 D. & E. 360, *Rabone v. Williams* and *George v. Claggett*. The law is otherwise in the case of a broker. 2 B. & A. 137, *Barring v. Corrie*.

The distinction is grounded upon the circumstance, that a factor has a right to sell in his own name, but a broker in so doing exceeds his authority.

54. The English statute is section 13 of chapter 22, 2 Geo. II, entitled "An Act for the relief of debtors with respect to the imprisonment of their persons," and the section reads as follows: "And be it further enacted by the authority aforesaid, that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue."

55. *Contra*:—*Wake v. Tinkler* (1812) 16 East, 36; *McDade v. Mead* (1850) 18 Ala. 214; *Milburn v. Guyther* (1849) 8 Gill (Md.) 92.

Where one of a firm appears to the world to be the only person engaged in the business, and to be solely interested, if he sells goods, the purchaser may avail himself of any claim he has against such person, in answer to an action in the name of the firm. 7 D. & E. 361, note.

Where a bond is taken in the name of one person, for the use of another, a set-off of claims against the person for whose use the bond was given is admissible, in a suit on the bond. *Bottins v. Brooks*, cited 1 D. & E. 621.

But in an action against two persons, their several demands against the plaintiff are not admissible as a set-off either in a court of law or equity. 4 N. H. Rep. 236; 6 N. H. Rep. 28; 11 Johns. 70; 4 Johns. C. Rep. 11; 3 Johns. C. Rep. 351; 2 Merrivale. 121-122.

It thus appears that while courts have adhered strictly to the rule prescribed by the statute, they have been very liberal in the application of it, and have looked beyond the parties upon the record, to the real parties, and have applied the rule accordingly.

When the mutual demands between the parties upon the record are not in their nature assignable at law, the circumstance that a third person has acquired an interest in the demand of the plaintiff, will not in general preclude a set-off of the defendant's claims against the plaintiff. 3 N. H. Rep. 539, *Sanborn v. Little*. The reason of this is, that in such a case, it is just and reasonable that the assignee should stand in the place of the assignor.

We were at first inclined to think that the endorsee of a discredited note might be considered as standing in the place of the endorser, so as to admit a set-off of claims against the endorser. But, there is an important difference between demands which are negotiable, and those which are not so. In the one case, the defendant has, by his contract, made the legal title assignable, and has agreed to pay to anyone who may have the legal title. In the other case, he has made no such contract. When a note is negotiable, it may be assigned, and the legal title passes to the assignee, whether it is discredited or not, and whether the maker has a set-off against the payee or not. When a discredited note has been in reality assigned for a valuable consideration, the debt is due to the assignee. And in a suit upon the note, in the name of the endorsee against the maker, the endorsee and the maker are the real, as well

as the nominal, parties. And the endorsee cannot be considered as standing in the place of the endorser, unless the note can be considered as still due to the endorser; or the endorsee, by taking the discredited note, as having made the set-off his own debt; either of which is repugnant to common sense.

It would, therefore, seem that the set-off, in this case, was not admissible; because the demands of the plaintiff and the defendant cannot be considered in any point of view, as mutual demands; and so the claim of the defendant is not within the statute.

There are, however, cases, which are directly in point in favor of the defendant, and which must be examined. These are the cases of *Sargent v. Southgate*, 5 Pickering, 312; *Ford v. Stuart*, 19 Johns. 342, and *O'Callaghan v. Sawyer*, 5 Johns. 118.

These decisions are placed entirely on the ground that he who takes a discredited note, takes it subject to all objections and equities, to which it is liable in the hands of the endorser; and that a set-off is an equity within the meaning of this rule.

It is, without question, a very just and equitable rule, that he who takes a discredited note shall take it subject to any legal or equitable defence, to which it was liable in the hands of any previous holder. But is a set-off a defence within the meaning of this rule?

Strictly speaking, a set-off is not a defence. When a set-off is made, mutual claims, to an equal amount on each side, become, under the statute, a satisfaction of each other. They operate as a payment of each other. When the claim of the plaintiff is wholly paid by a set-off, the action is at an end, and he may be liable to costs. But his claim has not been defeated by a defence, but has been paid by the extinguishment of claims against him, to an equal amount. And, with the exception of the cases, to which we have just adverted, no case has occurred to us, in which a set-off has ever been considered as a defence, within the meaning of the rule, on which the decisions, in those cases, rest.

In order to determine whether a set-off be within that rule, we must advert to the statute of set-off, and see what a set-off is, and when it is authorized by the statute. The question is, not whether there should be a set-off in a case like this, but whether there can be one under the statute.

This last question does not seem to have been examined or considered, by the courts, either in Massachusetts or New York, in the cases where it was decided that a set-off was admissible, in a case like this.

The statute authorizes a set-off of mutual demands between the plaintiff and defendant. All mutual demands, equitable as well as legal, between the real parties to the suit, are within the statute. This is the utmost extent of the rule prescribed by the statute. And from the very nature of it, nothing can be a set-off but a claim against a person whom the defendant has a right to consider the real plaintiff. But in this case the defendant made the note payable to the order of the payee; and it having been actually transferred to the endorsee, what right has the defendant to consider the endorser as the real plaintiff? On what reasonable ground can the endorser be so considered, by any person? We see none.

The circumstance, then, that the account of this defendant is a claim against the endorser, and would be a good set-off, if the endorser were the real plaintiff, renders it inadmissible, under the statute, in this case. From the very nature of a set-off, an account of the maker of a negotiable note against the payee cannot run with the note and be a defence to it in the hands of any person, to whom it has been legally transferred. The moment the note is actually transferred, the demands must cease to be mutual; and of course, must cease to be within the statute.

* * * * *

We are of opinion that the set-off, in this case, was improperly admitted, and there must of course be

*A new trial granted.*⁵⁶

56. The demand, in order to be a subject of set-off, must be due and payable at the commencement of the action. *Houghton v. Houghton* (1853) 37 Me. 72; *Spradbery v. Gillam* (1851) 20 L. J. N. S. Exch. 237; *Evans v. Prosser* (1789) 3 T. R. 186; *Henry v. Butler* (1864) 32 Conn. 140; *Toppan v. Jenness* (1850) 21 N. H. 232; *Roig v. Tim* (1883) 103 Pa. St. 115.

Upon the point whether a set-off of a demand against the payee is available against an endorsee of a negotiable note who took after maturity, the rule here stated is adhered to in England and probably in a majority of the American states. See 2 *Daniel on Negotiable Instruments* (6th Ed.), §§ 1436, 1437.

BURGESS v. TUCKER.

*Supreme Court of New York. 1809.**5 Johnson, 105.*

THOMPSON, J., delivered the opinion of the court. This was an action of debt upon a bond, conditioned for the performance of an award. By the pleadings and assignment of breaches, it appears that the award was in favor of the plaintiff, for the sum of twelve dollars and fifty-nine cents, for the recovery of which this action was brought. The defendant, pursuant to his plea and notice, offered in evidence, as a set-off, a promissory note, drawn by the plaintiff to one Chappel, and duly endorsed to the defendant. This was objected to, but admitted. And the questions now presented to the court are, whether any set-off was admissible in this case; and if so, whether it ought not to be against the penalty, and not against the award.

We think the set-off was properly admitted. The statutes in England, and our act, allowing a set-off, have always been considered as very beneficial acts, tending to prevent circuitry of action. It is laid down by Montagu (p. 18) that a set-off cannot be pleaded to a debt on bond, conditioned for the performance of covenants, where damages are to be assessed by a jury, nor to an action for general damages, in covenant or assumpsit; but a set-off may be pleaded to an action of debt, covenant, or assumpsit, for a sum certain. Is not the present action for a sum certain? The plaintiff claimed nothing more than the twelve dollars and fifty-nine cents. Had the action been upon the award, and not upon the bond, no objection certainly could have been made to the set-off. The action, though in form upon the bond, is in substance upon the award; and to exclude the set-off would be yielding substance to form. In order to allow a set-off, the plaintiff's cause of action must be such, that it would have been a good set-off for him, had he been the defendant. (2 Johns. Rep. 155.) Suppose the parties in this case changed, and the action had been by the defendant against the plaintiff, upon this note. What possible objection could there have been against the plaintiff's setting off the award? The sum is certain, liquidated, and

precisely ascertained. Wherever the debt is so certain, that an *indebitatus assumpsit* would lie for it, it may be set off (Cowp. 56). The English statutes on this subject are in substance the same as ours; so that their decisions upon the construction of their statutes are in point as to the construction of ours. (2 Johns. Rep. 155.) In the case of *Collins v. Collins* (2 Burr. 825), Lord MANSFIELD says, that before the statute, the actual payment of money in discharge of the demand was exactly upon the same footing as the set-off of a debt is now put upon; and a plea of payment of a sum of money sufficient to discharge the whole demand, was just the same then as the set-off of a debt large enough to balance the whole demand is now. It was a full answer to the plaintiff's demand; and he could have no judgment at all against the defendant. The setting off of mutual debts has become equivalent to actual payment, and a balance shall be struck, as in equity and justice it ought to be. To apply these principles to the case before us, would it not have been competent for the defendant to have craved oyer of the bond and condition, and set out the award, and plead payment of the twelve dollars and fifty-nine cents? If so, it necessarily follows, that such payment may be shown by a set-off. This case likewise decides, that notwithstanding the set-off being allowed, the penalty of the bond remains as a security against all future breaches, which is an answer to one of the difficulties suggested by the plaintiff's counsel. In this case, also, the condition of the bond was not only for the payment of an annuity, but for the maintenance of a certain person therein named; which shows, that the right of set-off to bonds is not confined to cases where the condition is for the payment of money only. The set-off may be good as to one part of the condition, and not as to another. We do not understand our statute (24 Sess. c. 90) as saying, or implying, that a set-off to an action on the penalty of a bond is confined to cases where the condition is for the payment of money only. It only declares, that when the action is for the recovery of a penalty for the nonpayment of money only, the sum bona fide and in equity due, and not the penalty, shall be deemed to be the debt due. But were it necessary to go thus far, I should consider, that the bond in question, by the award, become substantially a bond for the payment of twelve dollars and fifty-nine cents.

In order to determine the right of set-off, we may look at the state of things disclosed by the pleadings, and the object and intention of the bond; we are not confined to what appears on the face of it. In the case of *Fletcher v. Dytche* (2 Term Rep. 32) the bond was conditioned for the performance of certain work within a stipulated time, and on failure thereof, for the payment of a weekly sum thereafter, until the work was finished. The work not being finished within the time, the sum of 40 l. became forfeited, according to the provisions of the bond, and this sum was allowed to be a good set-off. This bond, upon the face of it, was not conditioned for the payment of money, but for the performance of work; and whether the weekly forfeiture could ever become payable, was, at the time of the execution of the bond, contingent and uncertain, but was made certain by matter *ex post facto*. Upon the face of the bond, nothing was due to the obligee; and whether anything ever would become due, depended altogether upon subsequent events, to be established by proof, *dehors* the bond. The only question with the court was, whether the set-off, offered in evidence, had not become certain and liquidated damages. So, in the case before us, the bond, upon the face of it, is for the performance of certain engagements, in their nature uncertain and contingent, at the time of the execution of the bond; but which became certain by the subsequent award, which, so far as respects the twelve dollars and fifty-nine cents, may be considered as liquidating the damages.

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BARBER v. ROSE.

Supreme Court of New York. 1843.

5 Hill, 76.

Error to the Rensselaer Common Pleas. Rose sued Barber in a justice's court, and declared in assumpsit on the common counts, and also on a special contract by which the plaintiff agreed to lay a quantity of stone wall and dig a certain ditch for the defendant for the sum of \$100. The

declaration further averred that, after performing a part of the work, the defendant agreed to aid the plaintiff in completing the job for a reasonable compensation. The plaintiff claimed \$100 damages. Plea, the general issue and set-off; also that the plaintiff never finished any part of the ditch, to the defendant's damage of \$100. Replication, that plaintiff had finished the ditch. On the trial before the justice, it appeared that the plaintiff agreed to build the wall and dig the ditch for the price mentioned in the declaration, the work to be completed by a certain time. The plaintiff commenced the work, but failing to complete it by the stipulated time, the defendant told him to go on with the job, and that he (the defendant) would turn in and help him on being allowed a compensation for his services. The defendant accordingly furnished assistance to the plaintiff, and the work was finally finished. The defendant offered to show, among other things, by way of recoupment of damages, that he had sustained loss by reason of the ditch not having been finished at the time specified in the original contract. The plaintiff objected, on the ground that the time had been extended by the agreement of the parties; and the justice sustained the objection. * * *

COWEN, J. * * *

Was the proof in mitigation admissible under the general issue? I think that question arises. There was no notice of a claim for the default as to time; but only for not completing any part of the ditch. This rather precludes the idea that the defendant intended to put himself on time; and the evidence was not admissible unless proper under the general issue.

The rule of recoupment has come to us from England, accompanied with the remark that, where the quality of work done at a stated price is to be impeached, notice of the defence is proper. (Lord ELLENBOROUGH, C. J., and LAWRENCE, J., in *Basten v. Butter*, 7 East, 479.) Counsel had complained of surprise, and BULLER, J., had refused to allow the defence, while Lord KENYON had allowed it; and the remarks mentioned seem to have been thrown out, first, as a reply to the counsel, and, secondly, as possibly tending to reconcile the conflicting decisions of the judges. They probably led the chancellor to say, in *Reab v. McAlister*, 8

Wend. 109, that he considered a like defence perfectly just and equitable when the plaintiff has notice of it. In *Ives v. Van Epps* (22 Wend. 157) the point was raised; but it was not thought necessary to decide it. I there said, notice may be necessary; but added, that the rejection of the evidence was not put on the want of it. The question has never been much thought of, so far as I can discover, nor do I find it has ever become necessary to decide it in any of the cases where it has been mooted. In no English case, except *Basten v. Butter*, is the idea of notice suggested. Other decisions have gone forward without any attention to it. (*King v. Boston*, 7 East, 481, note (a), A. D. 1789; *Farnsworth v. Garrard*, 1 Camp. 38, A. D. 1807; *Okell v. Smith*, 1 Stark. Rep. 107, A. D. 1815; *Poulton v. Lattimore*, 9 Barn. & Cress. 259, A. D. 1829; *Allen v. Cameron*, 3 Tyrwh. 907, 1 Cr. & Mees. 832, S. C., A. D. 1833; *Street v. Blay*, 2 Barn. & Adolph. 456, A. D. 1831, recognizing *Cormack v. Gillis*, cited 7 East, 480, 481; and see *Cousins v. Baddon*, 1 Gale, 305.) These cases belong to two classes; one where the defence was partial, another where it was total. The want of notice was equally disregarded in both. Mr. Leigh, in his late book on *Nisi Prius* (vol. 1, p. 79). deduces the rule from *Basten v. Butter*, in these words: "The defendant should (though he need not) give notice to the plaintiff of the intended defence; for otherwise he may have ground to complain of surprise, as he may only come prepared to prove the agreement for the specific sum." I presume he means to be understood as saying that the defendant may or may not give notice at his pleasure; but if he gives none, the court will listen more readily to a motion for a new trial on the ground of surprise. That any judge or writer ever intended to lay the rule down as one of pleading, I do not believe. There is no color in precedent or principle for saying that a defence striking directly at the whole cause of action need be pleaded in an action of assumpsit; and there is still less ground for saying that a partial defence—matter going merely to mitigate damages—should be pleaded. A partial defence can never, according to our cases, be introduced by a plea; and the universal rule both in England and this State is, that where a matter cannot be pleaded, it may be given in evidence. (*Herkimer Manufacturing and Hydr. Co. v. Small*, 21 Wend. 273, 277; *Wilmarth v. Babcock*, 2 Hill, 194, 196.) No

one will pretend that the statute of special notice applies; for by that you can give notice of such matter only as may be pleaded. (*Wilmarth v. Babcock, supra.*) The matter does not come in as a set-off, and so is not within the statute of notice with respect to that. In short, I am satisfied that to require notice of a defence by way of recoupment in any case, would be a departure from principle, from precedent, and all the analogies of pleading. The truth is, as remarked by Mr. Justice BRONSON in *Bateman v. Pierce*, 3 Hill, 172, the doctrine of recoupment is of recent origin. It would not have been surprising, therefore, after the remarks in *Basten v. Butter*, had some judges required a plea or notice. The cases fluctuated for some time both in England and this State on the question whether the doctrine itself should be received into the law. About as much has been said on the point of notice in one country as in the other; but not enough in either to give any serious countenance to the idea that it is necessary.

On the whole, I am entirely satisfied that the fact of the plaintiff's contract having been broken as to time, formed a good ground for claiming damages by way of recoupment; and that the defence was admissible under the general issue.⁵⁷ The judgment of the common pleas affirming that of the justice should be reversed.

BRONSON, J.: Although it may never have been directly and necessarily decided that the defendant must give notice of his intention to recoup damages, it has often been assumed by the courts of this State that notice must be given; and such appears to be the general opinion of the profession. Very few cases have fallen under my observation where the defence was attempted without a notice.

If this must be regarded as an open question, then, upon principle, I think notice should be required. The defendant often has an election either to bring a cross-action or to set up his claim by way of recouping damages; and without a notice the plaintiff may be surprised on the trial by a defence which he is wholly unprepared to meet. There can be no hardship upon the defendant in requiring him to give

57. *Accord*:—*Tully v. Excelsior Iron Works* (1826) 115 Ill. 544; *Cooke v. Preble* (1875) 80 Ill. 381; *Lee v. Rutledge* (1878) 51 Md. 311; *Keyes v. Western Vermont Slate Co.* (1861) 34 Vt. 81; *Allen v. Hooker* (1853) 25 Vt. 137; *Wilson v. Town of Greensboro* (1881) 54 Vt. 533; *Blodgett v. Berlin Mills* (1872) 52 N. H. 215; *Sterling Organ Co. v. House* (1884) 25 W. Va. 64; *Gaw v. Wolcott* (1848) 10 Pa. St. 43.

notice, while a different rule would be likely to work injustice. I am aware that notice is not necessary where the defence goes to the whole consideration of the promise on which the plaintiff sues. Such a defence shows that the plaintiff has no cause of action, and is fairly covered by the plea of non assumpsit. But it is not so, where, as in this case, the defence admits that the plaintiff has a right to sue, and seeks to recoup damages on the ground that the plaintiff has failed to perform some stipulation in the contract which was obligatory upon him. In such a case notice should be given.⁵⁸

But the defence seems to have been rejected on the ground that it was not, in its own nature, admissible. The want of notice was not mentioned in the court below. On this ground I agree that the judgment should be reversed.

NELSON, Ch. J., concurred in this view of the question.

Judgment reversed.

58. In *Organ Co. v. House* (note 57, *supra*), the court suggests a distinction between cases where the recoupment is a mere reduction in the amount of damages and cases where the entire contract or transaction between the parties is opened up for the adjustment of cross-actions, and holds that in the former cases the defense would be admissible under the general issue without notice, but in the latter cases there should be special notice given under the general issue. But the court expressly states that no recoupment should ever be set up in a special plea. The practice of giving notice under the general issue is a modern statutory substitute for special pleas at common law.

Accord:—*McLure v. Hart* (1857) 19 Ark. 119; *Hogg v. Cardwell* (1856) 4 Sneed (Tenn.) 151 (expressing doubt as to the rule but recommending that it be pleaded). *Simonds v. Cross* (1884) 63 N. H. 123.

WARD v. FELLERS.

Supreme Court of Michigan. 1854.

3 Michigan, 281.

This was an action of assumpsit originally brought in a justice's court, and upon appeal, tried in the circuit court for the county of Wayne. The plaintiffs claimed to recover as common carriers for freight and charges for the transportation of eight packages of merchandise, against which the defendants set up a claim by way of *recoupment* against

the plaintiffs for damages done to the goods while in the plaintiffs' possession.

The cause was tried by jury and a special verdict found, "That the defendants are indebted to the plaintiffs in the sum of \$34.94 for the freight and transportation of goods, and interest thereon; that in transporting said goods the defendants suffered damage by the default of the plaintiffs, who were common carriers, to and upon the goods so transported to the amount of \$125.6/20, interest, etc." Upon this verdict a motion was made by the defendants' counsel for judgment on the verdict in their favor, and the opinion of this court was asked whether the defendants were entitled to judgment against the plaintiffs for the excess of their damages as found in the special verdict over the amount of the freight earned by the plaintiff."

* * * * *

By the Court, MARTIN, J.: At the common law a defendant was in no instance allowed to recover a judgment for damages for a positive claim against a plaintiff. To obviate the rigor of this rule of law, and as well to avoid a multiplicity of actions as to enable parties where there were mutual cross demands unconnected with each other, and arising upon contract express or implied, which are liquidated or capable of being ascertained by calculation, and not resting in opinion only, to have the whole adjudicated upon in one action, the statutes of set-off were enacted. Hence, set-off is the compensation of one debt or demand for another, by virtue of which damages are recovered by the party in whose favor a balance shall be found, and the judgment is statutory. But at the common law before the adoption of the statutes of set-off, the defendant was entitled to show that the plaintiff had not sustained damages to the extent alleged, and thus to reduce, or altogether defeat the plaintiff's recovery. This right of the defendant was, however, in the earlier period of the law, of very limited application, and could only be resorted to when the defendant insisted upon a deduction from the plaintiff's demand arising from payment in part or in whole, or former recovery, or some analogous facts. * * * It is evident, says Mr. Sedgwick (see *Sedg. on Dam's*, 2 Ed. 431), that recoupe, or recoupment, in its original sense, was a mere right of deduction from the amount of the plaintiff's recovery, on the ground that his damages were not really

as high as alleged." This was allowed to avoid circuity of action, and was only permissible when the subject-matter of reduction sprang immediately from the claim relied upon by the plaintiff. This defence is contradistinguishable from set-off in these three essential particulars. 1st. In being confined to matters arising out of, and connected with the transaction or contract upon which the suit is brought. 2d. In having no regard to whether or not such matters be liquidated or unliquidated. (*Wheat v. Dotson*, 7 Ark. R. 699). And 3d. That the judgment is not the subject of statutory regulation, but controlled by the rule of the common law.

This remedy was, in the earlier periods of the law, of very limited application, and it is said, it is in cases where fraud entered into, but did not equitably go to the entire prevention of a recovery by the plaintiff, that we find the first cases of the defense in question in the common-law courts of England. Whether this be strictly true or not, it is certain that so much uncertainty involved the remedy, and it was so trammelled by the technical rules of the law, that it was but little used—the defendant preferring his cross action or the relief afforded by equity—and the term itself became obsolete. Yet the principle was always retained under the form of a diminution of damages, upon the equitable ground of avoiding circuity of actions, and we constantly encounter it in the books, and most frequently involved in a question as to the sufficiency of pleadings. But within a few years not only has the term been revived, but the doctrine has also, and as the rigid rules of the common-law courts have yielded to the influence of social progress, and the expansion of the commercial relations of society and the new developments of trade, common justice as well as common sense and convenience have adapted it to present wants, infused into it new vigor, and rendered it a valuable remedy in the administration of justice, as at present understood and administered. In all cases where the demands of both parties spring out of the same contract or transaction, the defendant may recoupe, although the damages on both sides are unliquidated. See *Bateman v. Pierce*, 3 Hill, 172. "It was formerly," says BRONSON, J., in *Bateman v. Pierce*, "supposed that there could only be a recoupment where some fraud was imputable to the plaintiff in relation to the con-

tract on which the action was founded; but it is now well settled that the doctrine is also applicable when the defendant imputes no fraud, and only complains that there has been a breach of the contract on the part of the plaintiff. As now generally administered in this country, it opens up the entire contract or transaction, so far as necessary to determine the plaintiff's right to damages, and the amount, and the defendant's cross claims." See 15 Mass. 389; Story on Bail sec. 315; *ib.* sec. 349; 20 Wend. 51, 269; 3 Metc. 9; 14 Pick. 359; 6 Mass. 20; 3 Dana, 489; 20 Conn. 204; 1 Scam. 403; *Stone v. Yarwood* in Sup. Ct. of Ill., cited in Monthly Law Rep. 456; and cases hereafter cited. In the language of the court in *Stone v. Yarwood*, "this doctrine of recoupment tends to promote justice and to prevent needless litigation. It avoids circuity of action and multiplicity of suits. It adjusts by one action adverse claims growing out of the same subject-matter. Such claims can generally be much better settled in one proceeding than in several. It is not necessary that the opposing claims should be of the same character. A claim originating in contract may be set up against one originating in tort. It is sufficient that the counterclaims arise out of the same subject-matter, and that they are susceptible of adjustment in one action." See also *McAllister v. Reab*, 4 Wend. 482; 8 *ib.* 109.

But while it is said that by the application of the doctrine of recoupment, circuity is avoided, and the rights of parties adjusted in one and the same suit, it must be understood that such adjustment is only by way of abatement or reduction, and that no other judgment can be rendered than such as is authorized by the rules of the common law. This necessarily follows from what has already been said, and a reference to a few of the many authorities which might be cited upon this subject will show that such is the universally received doctrine. * * * In *Bateman v. Pierce*, 3 Hill, 172, the court say, "for the purpose of avoiding circuity or multiplication of actions, and doing complete justice to both parties, they are allowed and compelled, if the defendant so elects, to adjust all their claims growing out of the same contract in one action." And in a subsequent portion of the same opinion, this language is explained and qualified as follows: "The defendant has the election whether he will set up his claim in answer to the

plaintiff's demand, or resort to a cross-action; and whatever may be the amount of his damages, he can only set them up by way of abatement, either in whole or in part of the plaintiff's demand. He cannot, as in the case of a set-off, go beyond that, and have a balance certified in his favor.'" * * *

* * * * *

It appears from these, and indeed, from all the authorities, as well as from principle, that the force of the remedy by recoupment is spent in the discount or abatement of the plaintiff's claim, either partially or wholly, as the case may be. The defendant has his election to pursue this remedy, and thus save the expense and delay of his cross-action, or he may maintain such action for the default or failure of the plaintiff, and for his damages, as may best subserve his interests. The defence then not being compulsory, but one of choice, the defendant can hardly urge with propriety that a hardship is imposed upon him by denying him a judgment for his excess of damages, when such is found to exist.

It was suggested upon the argument, that if the defendant should choose to recoupe his damages, instead of resorting to a cross-action, he would be barred from recovering any excess or further damages in a second action, by reason of the former adjudication, and from this was argued the hardship of the rule, denying him a judgment in this case. This suggestion, if well founded, can have little force in opposition to settled rules of law, for the defence is at the defendant's option. But I nowhere find it adjudged that such would be the result. It is true that in *Britton v. Turner* (6 N. H. 481), PARKER, J., says, "There may be instances, however, where the damage occasioned is much greater than the value of the labor performed, and if the party elects to permit himself to be charged for the value of the labor, without interposing the damages in defence, he is entitled so to do, and may have an action to recover his damages for the nonperformance, whatever they may be; and he may commence such action at any time after the contract is broken, notwithstanding no suit has been instituted against him, but if he elects to have the damages considered in the action against him, he must be understood as conceding that they are not to be extended beyond the amount of what he has recovered, and he cannot afterwards sustain an action for further damages."

In *Fabricatte v. Lannitz* (3 Sand. S. C. R. 744), this suggestion of Judge PARKER, that the defendant cannot sustain an action for further damages, is approbated. But in neither case was the question before the court, and the suggestions are only important as shewing the universality of the doctrine that the defendant, by recoupment, can only reduce the plaintiff's damages, and takes nothing in that action for his excess of damages.

But in *Mendell v. Steel* (8 M. & W. 858), this question of the right to maintain an action for further damages was before the court, and PARKE, B., after discussing to some extent the origin and present extent and application of this doctrine of diminution or reduction of damages by the defendant, uses this language: "It must, however, be considered that in all cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which is found so convenient, is established; and that it is competent for the defendant in all of those, not to set off by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by a breach of the contract, but simply to defend himself, by showing how much less the subject-matter of the action was worth by reason of the breach of contract, and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action, but no more. All the plaintiff could by law be allowed in diminution of damages on the former trial, was a deduction from the agreed price, according to the difference at the time of delivery between the ship as she was, and what she ought to have been, according to the contract; but all claims for damages beyond that, on account of the subsequent necessity for more extensive repairs, could not have been allowed in the former action, and may now be recovered."⁵⁹ Although this authority does not cover the entire question suggested by

59. This is perhaps doubtful (1 Sutherland on Damages, § 189; Edgemoor Iron Co. v. Brown Hoisting Mach. Co. (1906) 6 Pennw. (Del.) 10), though it is quite clear that if the defendant attempts to establish a recoupment and is defeated on the merits he will be barred from afterwards prosecuting an independent action on the same facts. (Grant v. Button (1817) 14 Johns. (N. Y.) 377; O'Connor v. Varney (1857) 10 Gray (Mass.) 231; Beall v. Pearre (1858) 12 Md. 550.)

the defendants' counsel, it shows that the judgment in the former action is not considered as necessarily a complete and final adjudication of the whole subject-matter of the defendants' injury, in all cases. Nor is there any hardship in the rule that when the defendants' claim for damages is complete at the time he seeks to recoupe them, he shall be considered as waiving all of such claim against the plaintiff, except so much as will defeat the recovery. The defence by recoupment is voluntary. The remedy by cross-action always subsists, and the defendant is presumed to know the extent of the loss and injury he has sustained. With both remedies before him, the exercise of an option, when the consequences are known and can be provided against, can never be regarded as imposing a hardship. If, then, the defendant at his election can compel the whole matter to be adjudicated in one action, it can do no great injustice to say, that by such choice he concedes that he has no claim for damages, beyond those of the plaintiff, and that he is content to defeat the plaintiffs' recovery.

* * * * *

It must be certified to the circuit court for the county of Wayne as the opinion of this court, that the defendants are not entitled to judgment against the plaintiffs for the excess of their damages, as found by the special verdict over the amount of the freight earned by the plaintiffs.

CHAPTER VIII.

PLEAS IN ABATEMENT.

PITTS SONS' MANUFACTURING COMPANY v. THE COMMERCIAL NATIONAL BANK.

Supreme Court of Illinois. 1887.

121 Illinois, 582.

Plaintiff in error made and delivered to Meeker & Co. its three promissory notes, which the payees assigned to defendant in error, who brought suit thereon. The defendant pleaded, specially, three pleas; but reliance was placed upon the second amended plea, which was as follows:

“Now comes the said defendant, by its attorneys, and by leave of the court, etc., and defends, etc., and says *actio non*, etc., because, it says, that the causes of action set forth in the special counts, and in the common counts of said plaintiff's declaration, are one and the same, and not other or different; that the only demand said plaintiff has against said defendant is upon the promissory notes, copies of which are attached to the said declaration, and which are declared upon in the special counts thereof. This defendant further says, that the plaintiff was not a bona fide holder, but held the notes in trust for Meeker & Co.; that on the day named, defendant was in embarrassed circumstances and unable to meet its financial obligations; that Meeker & Co., then the owners of the notes, were threatening suit thereon; that defendant was then indebted to Meeker & Co. on the notes, and also was indebted upon debts due to certain other creditors (naming them), which last named creditors also threatened suit; that Meeker & Co., at the request of the defendant, and in consideration that the other creditors, aforesaid, of defendant, would withhold suit against defendant and give further day of payment, then and there agreed with defendant, and with the other creditors of defendant, aforesaid, to withhold suit against defendant, and to extend the time and give

(641)

further day of payment, as follows (naming such time), and not to sue defendant upon either of said notes until default had been made in the said payments upon the said further days, as aforesaid; that Meeker & Co. and the creditors named, in consideration that each should withhold suit and give further days of payment, as aforesaid, then and there mutually agreed to, and did, withhold suits, and did give further day of payment, as aforesaid, and then and there mutually agreed not to bring suit until default had been made in the payments upon said further days of payment, as aforesaid. And this defendant is ready to verify; wherefore it prays judgment," etc.

This suit was commenced and plea filed before either of the installments became due according to the agreement set up in the plea. A demurrer to the plea was sustained. The defendant stood by its plea, and final judgment for plaintiffs was rendered, which the appellate court for the second district affirmed. The record is brought here by writ of error to that court.

* * * * *

SHOPE, J., delivered the opinion of the court.

The common-law system of pleading has prevailed in this State, and, from time to time, such modifications have been made by statute as seemed to be required, removing arbitrary and artificial distinctions, and, by the allowance of amendments at any and every stage of the proceeding, and to every reasonable extent, doing away with its purely technical and objectionable features. As a system of pleading, and as existing in this State, it is clearly defined, easily understood and certain. With the general, logical arrangement of the system, as at common law, there has been no interference by statute. The order of pleading, and the structure and office of pleas of different character, remain substantially unchanged. Without entering into an extended discussion, a statement of some of the principles of pleading seems necessary.

Pleas are divided into two general classes, viz., dilatory and peremptory, otherwise designated as pleas in abatement and pleas in bar. A plea in abatement is defined to be, a plea that, without disputing the justness of the plaintiff's claim, objects to the place, mode or time of asserting it, and requires that therefore, and *pro hac vice*, judgment be given for the defendant, leaving it open to renew the

suit in another place or form, or at another time; while to the second class belong all those pleas having for their object the defeating of the plaintiff's claim. Hence, a plea in bar of the action may be defined as one which shows some ground for barring or defeating the action, and makes prayer to that effect. Pleas in bar and pleas in abatement have, therefore, this marked distinction: Pleas in bar are addressed to the merits of the claim and as impairing the right of action altogether, whereas pleas in abatement tend merely to divert, suspend or defeat the present suit. 1 Saunders' Pl. and Ev. 1, 2; Comyns' Digest, title "Abatement;" 1 Chitty's Pl. 441.

Owing to the nature and effect of pleas in abatement, they are required to be certain to every intent. (Comyns' Digest, title "Abatement," 1, 11.) Whenever the subject-matter to be pleaded is to the effect that the plaintiff cannot maintain any action at any time, it must be pleaded in bar; while matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should be pleaded in abatement. 1 Chitty's Pl. 445.

Whether a plea is in abatement or in bar is to be determined, not from the subject-matter of the plea, but from its conclusion. The advantage or relief sought by the plea—the prayer of the plea—determines its character. (*Jenkins v. Pepoon*, 2 Johns. Cas. 312; 1 Tidd's Pr. 637.) It would be both illogical and absurd in a plea in bar to pray, as in a plea in abatement to the count or declaration, "judgment of the said writ and declaration, and that the same may be quashed;" and as only the relief asked can be awarded, a mistake in this regard is fatal to the plea. And, hence, the rule that a plea beginning in bar and ending in abatement is in abatement, and though beginning in abatement and ending in bar is in bar, so a plea beginning and ending in abatement is in abatement, though its subject-matter be in bar, and a plea beginning and ending in bar is in bar, though its subject-matter is in abatement. (Comyns' Digest, title "Abatement," b. 2.) With respect to all dilatory pleas, the rule requiring them to be framed with the utmost strictness and exactness is founded in wisdom. It says to the defendant: If you will not address yourself to the justness and merits of the plaintiff's demand, and appeal to the forms of the law, you shall be judged by the strict letter of the law. And so it has been

held that a plea in abatement concluding, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, etc. (a conclusion in bar), is bad. *Jenkins v. Pepoon*, 2 Johns. Cas. 312; *Isley v. Stubbs*, 5 Mass. 280.

An inspection of the plea in question shows that in form and structure, in its beginning and conclusion, it is a plea in bar to the count and declaration, and upon application of the principles announced it must be held to be a plea in bar. Its subject-matter, however, is in abatement, and clearly falls within the definition of matter pleadable in abatement. The justness of the plaintiff's demand, that the defendant owes the debt evidenced by the notes sued on, is not denied, but the defendant denies that the debt is due. He objects, then, simply as to the time the debt shall be asserted against him. The contract set out in the plea is of an extension of the time of payment, and such a contract, this court has repeatedly held, cannot be pleaded in bar of an action brought before the time has expired. *Guard v. Whiteside*, 13 Ill. 7; *Hill v. Enders*, 19 id. 163; *Payne v. Weible*, 30 id. 166; *Archibald v. Argall*, 53 id. 307; *Culver v. Johnson*, 90 id. 91.

The circuit court did not err in sustaining the demurrer to the plea, and when the defendant elected to stand by its plea, final judgment was properly rendered against it; for the rule is, if matter in abatement be pleaded in bar of the action, final judgment shall be against the defendant, if the plea be disallowed. Comyns' Digest, title "Abatement," 1, 15.

Judgment affirmed.

HAVERHILL INSURANCE COMPANY v. PRESCOTT.

Supreme Judicial Court of New Hampshire. 1859.

38 New Hampshire, 398.

FOWLER, J.: By the 17th section of chapter 182 of the Revised Statutes (Comp. Laws 465), it is provided that "all original writs shall, before they are served, be indorsed on the back thereof by the plaintiff, his agent, or

attorney, being an inhabitant of this State; and if the plaintiff is not an inhabitant of this State, by some responsible person who is such inhabitant."

The present action was entered at the November term, 1858, of the court of common pleas for this county, and at the subsequent April term, 1859, the defendants moved to quash the writ for the want of a sufficient indorsement. The court overruled the motion, and the defendants excepted. Is their exception well taken? It seems to us clearly not.

It is not necessary to decide, in this case, whether a motion to quash, for the want of any indorsement apparent upon the writ itself, should be made at the first term, and within the first four days of that term, under the rule relating to pleas in abatement, on the ground that matters in abatement are to be taken advantage of in the same time by motion, as by plea, as has been contended by the counsel for the plaintiffs. Upon an inspection of the writ it appears that there is indorsed upon the back thereof the name of Samuel Dudley. It makes no difference that the letters, "Agt.," are added to that name, indicating that he claimed to be the agent of the plaintiffs, or of somebody else. If necessary, those letters would be held a mere matter of description, and he would be personally bound. *Pettengill v. M'gregor*, 12 N. H. 179; *Woods v. Blodgett*, 15 N. H. 569; *Brackett v. Bartlett*, 19 N. H. 129.

The writ, then, having the name of Samuel Dudley written upon its back, was prima facie well and sufficiently indorsed, and the motion to quash it was properly denied, as the court will abate an action, upon motion, only when the abatable defects are apparent upon the writ itself.

If the defendants relied upon the fact that Samuel Dudley was not the name of a person, that he was not an inhabitant of this State, that his name was not placed upon the back of the writ by himself, or by his authority, or that he was not a responsible person, they should have pleaded the supposed defect in abatement, so as to have given the plaintiffs an opportunity, by the proper replication, to have raised an issue upon any traversable objection to the indorsement. *Jacobs v. Mellen*, 14 Mass. 134; *Hawkes v. Inhabitants of Kennebunk*, 7 Mass. 461; *Purple v. Clark*, 5 Pick. 206.

The exceptions taken to the ruling of the court below must, therefore, be overruled, and the judgment of the court below, on the point in controversy, be affirmed.

Exceptions overruled.

WITMER v. SCHLATTER.

Supreme Court of Pennsylvania. 1836.

15 Sergeant & Rawle, 150.

DUNCAN, J.: This is a plea in abatement, and the cause was, "that the promises, if ever such promises as are laid in the declaration were made, were made with one George Earp, who is still living." The plaintiffs moved to strike off this plea, because put in too late, and because there had been in a former action a plea in abatement, that all the proper parties were not sued, and the action abated. To this it has been answered by the defendants, that the defendants who now put in this plea, were not sued in the first action; and the plaintiffs reply to this, that the defendants are all bound by the plea of their partners in the former action.

The plea is a plea in abatement; for where any person who ought to be joined as a defendant is omitted, this is pleadable in abatement only, and not in bar; because such plea is to give the plaintiff a better writ, which is the true criterion to designate pleas in abatement from pleas in bar; and certainly such plea comes too late after a general imparlance; for this is an objection which applies to the writ itself, and the court holds a strict hand over the dilatory pleas, and will not suffer a departure from the usual forms of pleading in these cases. But if the plea had been put in in time, it ought not to have been received; for in this form of plea in abatement, that all the contractors are not sued, the defendant must give the plaintiff a better writ. 1 Saund. 284, note. Therefore it is, that in a plea of misnomer in the Christian name of the defendant, the defendant must show what his Christian name is, and also what is his true surname, and this, although the true surname, be already stated in the declaration, lest the

plaintiff should be defeated a second time by error in the names; for these pleas tending to delay justice are not favorably received, and the rule was adopted to check the repetition of these pleas in abatement. Stephen's Principles of Pleading, 435. And this sensible writer (in a book of small bulk, but which contains much useful matter) gives the meaning of the rule, that the defendant must give the plaintiff a better writ. It is, "that pleading a mistake in form, in abatement of the writ, the defendant must at the same time correct the mistake, so as to enable the plaintiff to avoid the same objection in framing his new writ." The defendants cannot say that they have corrected the mistake here, so as to enable the plaintiffs to avoid the same objection in a new writ, when they take the same objection to the new writ itself, the non-junction of all the contractors. They cannot say they have given him a better writ, and yet repeat the same objection to the new writ; a matter so perfectly within their own knowledge as the names of all the secret partners would be. Nor is it anything but mocking, to say one of the new defendants had no former opportunity to put in this plea; for, if it could be sustained, the plaintiffs' suit never could terminate in a trial on the merits. He might bring action after action, and every new defendant give one new name at a time. In the case of secret partners, it is hard enough for a plaintiff to be once put out of court for a mistake which he could not know, and which was scarcely known to any other than the ostensible partners themselves; but to put him one hundred times out of court, which are the principles contended for by the defendants, where the associates are numerous, would be excluding him so long as the associates please. The defendants did not give the plaintiffs a better writ, did not make known to them that which in fairness they ought to have done—the names of all the partners. Instead of correcting the mistake, and enabling them to avoid a repetition of the error, they lead them into a labyrinth, from which they cannot find out their way by any clue. The defendants should have given the plaintiffs all the names at once; that was the way to correct the error. The plaintiffs could not then have been defeated a second time for the same cause, namely the omission of the names of all the joint contractors. The plea admits, that if there is a cause of action, it is a joint one. The al-

legation is, that all the joint contractors were **not named**, the very plea put in before; and the very plea that might, if this action is abated, be used again and again and again. The plea is in the way of justice which the court ought to discourage. To suffer its repetition, would bring a reproach on the proceedings in courts of justice; the mischief to the plaintiffs is incalculable, while it inflicts no injury on the defendants, for all the partners would be entitled to contribution, and courts ought never to suffer pleading, which is said to be a great excellence in our jurisprudence, and to be founded on strong sense in the choicest and soundest legislation, to be made the instrument of oppression to the suitors. I speak of the consequences of suffering the plea in abatement to be thus used, without any relation to this particular case.

Plea in abatement struck off.

**BOSTON TYPE AND STEREOTYPE FOUNDRY v.
SPOONER.**

Supreme Court of Vermont. 1833.

5 Vermont, 93.

WILLIAMS, J.: In this case the defendant plead in abatement that there was no such person or corporation as the Boston Type & Stereotype Foundry. This plea was demurred to, and a judgment of *respondeat ouster*, rendered. To this judgment the defendant excepted. After a final judgment rendered for the plaintiff, the cause is brought here for a decision on the question of law arising on the exception, and presents the enquiry, whether the fact set forth in this plea, was the proper subject of a plea in abatement.

There can be no doubt, but that the fact, if verified, is an answer to the suit. In every action commenced in a court there must be a party against whom a judgment may be rendered, and an execution issue. The defendant is not compelled to answer to a suit, unless it is prosecuted in the name of a person either natural or artificial against whom he may have a judgment, and an execution to obtain satis-

faction of the same. He is not under the necessity of resorting alone to the recognizance, which a plaintiff must procure on praying out a writ, in order to collect his cost if he obtains judgment therefor; as the recognizance is only an accumulative security for the same.

This position is so obvious that it has not been controverted, but the only objection taken to the plea is that the fact should have been plead in bar. And if it is true, not only that it could have been plead in bar, but that it could not be plead in abatement, the objection is well taken. It does not follow, however, that because the defendant might have availed himself of this defence by plea in bar, therefore he cannot avail himself of the same, by plea in abatement. As a general rule, matter in bar cannot be plead in abatement, but to this rule there are exceptions, and the case under consideration comes within the exceptions. The nonjoinder of a person who ought to have been made a plaintiff may be plead in abatement, and advantage may also be taken of it under the general issue. In replevin, the defendant may plead property in himself or a stranger either in abatement or bar. Certain personal disabilities which entirely defeat the suit, may be plead in abatement or bar, as outlawry for felony, attainder, alien enemy. Coverture is only pleadable in abatement inasmuch as it does not destroy the cause of action, but only precludes the person from maintaining the suit.

It would seem from the principles on which pleas in abatement are founded, that the defence relied on by the defendant could only be taken advantage of by a plea in abatement, as it merely denies that there is any right in those claiming to prosecute, or that there is any such person as the plaintiff; leaving the contract to be enforced by those from whom the consideration proceeded. The authorities, however, show that it is a proper subject for a plea in abatement or bar.

That there may be a plea in abatement, to the disability of a plaintiff, denying his existence, showing that there is no such person *in rerum natura*, as that at the commencement of the suit he was a fictitious person is recognized in 1 Com. Dig. tit. abatement, E. 16; 1 Chitty, Pleadings, 435-6; *Guild v. Richardson*, 6 Pick. 370; *Doe v. Penfield*, 19 John. 308. That the same matter be plead in bar, we find in Bro.

Abr. Misnomer, 93, as quoted in the case of the *Mayor & Burgesses of Stafford v. Bolton*; Bos. & Pull. 40, 44.

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It has also been objected to this plea as a plea in abatement, that pleas in abatement must in all cases give the plaintiff a better writ, i. e., must be so plead as to enable the plaintiff in a subsequent suit to avoid the error committed in the first. This as a general rule is undoubtedly true. It obviously, however, has relation to those cases only where it is in the power of a defendant to give and where the plaintiff can have a better writ. As where the plea is founded on some fact of which the defendant is presumed to have knowledge. It cannot apply to those cases where a plaintiff cannot have a better writ. In the case of outlawry, attainder, alien enemy, and in other cases where the right of action is suspended on account of the disability of a plaintiff to sue, he cannot have a better writ while the disability exists. It is sufficient in a plea in abatement for any of those causes to set forth the fact without attempting that which is impracticable. It will be found that it is by no means a criterion to test in all cases whether a matter must be plead in abatement or bar, to determine whether it can be so plead as to enable the plaintiff in a subsequent action, to obviate the facts set forth in defence. As we find from the authorities that the subsequent matter of this plea is proper for a plea in abatement, and if that which is set forth is true, no better writ can be made in the name of the plaintiff, the writ must abate.

The judgment of the county court must therefore be reversed, and judgment entered that the writ abate.

LINDSAY v. STOUT.

Supreme Court of Illinois. 1871.

59 Illinois, 491.

McALLISTER, J., delivered the opinion of the court.

In this case, which was assumpsit upon two promissory notes, the defendant below filed, first, a plea in abatement, averring that plaintiff was a married woman at the com-

mencement of the suit, and her husband was still living. To this plea plaintiff first demurred, then obtained leave to withdraw the demurrer, and, replying, alleged that the notes sued on were her sole and separate property, etc. Rejoinder by defendant, traversing the matters alleged.

At a subsequent term the defendant, by leave, filed the general issue, and a special plea setting up that the notes were obtained by fraud. At the next term the defendant, by leave, withdrew the plea of the general issue. The record shows that, as the case then stood, there was a trial by a jury, and verdict for plaintiff for \$265.33, upon which judgment was rendered.

There is nothing in the record to show that the plea of fraud was answered by either demurrer or replication.

The defendant, by filing the general issue and special plea to the merits, waived the plea in abatement, and when the general issue was withdrawn, the case stood merely upon a plea of confession and avoidance; that plea remaining unanswered at the time of the so-called trial, there was no issue to be tried, and the unanswered plea constituting a good bar to the action, the judgment of the court below is erroneous, and must be reversed, and the cause remanded.

*Judgment reversed.*⁶⁰

60. A demurrer is also a waiver of a plea in abatement. *Ferguson v. Rawlins* (1859) 23 Ill. 69.

Time for filing.—"A dilatory plea must ordinarily be filed at the return term of the writ, if the declaration has been filed, or at the earliest practicable time. It has been held that a dilatory plea is too late after the expiration of the rule to plead, and that ignorance of a cause for abatement will not excuse the filing of the plea after the time limited. A plea in abatement cannot be filed after a general imparlance, or general continuance, nor after a motion for a continuance has been overruled. But it may be filed after a special imparlance entered of record. * * * But as in the case of other pleas, dilatory pleas may, in the discretion of the court, for cause shown, be received after the time limited has passed." 31 Cyc. 162, 163.

See *Douglass v. Belcher* (1834) 7 Yerg. (Tenn.) 104, given in the text *supra*, ch. V, sec. 1, as to contemporaneous filing of pleas in abatement and in bar.

See *Wilson v. Hamilton* (1818) 4 S. & R. (Pa.) 238, given in the text *supra*, ch. V, sec. 6, as to matter in abatement pleaded *purs darrein continuance*.

RICHARDS v. SETREE.*Court of Exchequer. 1816.**3 Price, 197.*

THOMSON, C. B.: This is a question as to the validity of the plea of privilege, which has been pleaded in abatement. There is no objection made to the form; but it is said that it has not been properly supported, by the affidavit of the truth of it, which is required in all pleas of abatement. The body of the affidavit, too, is admitted to be right in itself, but an objection is made to the title of it, which is, that it purports to have been made in another cause than that now before the court. (His Lordship stated the title of the affidavit, and of this cause.) Certainly, wherever an affidavit is made in a suit that has been commenced, it ought to be entitled, and as of the precise cause in which it is to be used.

* * * * *

The plea, therefore, was insufficient, for want of a proper affidavit in support of it. So that, independent of the other question on the validity of a plea of privilege, which, under the circumstances of this case, it has become unnecessary to discuss, the plea was, on that ground, a nullity, and the plaintiff was entitled to sign his judgment at the expiration of the four days.⁶¹

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61. The statute 4 and 5 Ann. c. 16, s. 11 (4) provided that no dilatory plea should be received unless the party offering such plea should by affidavit prove the truth thereof or show some probable matter to the court to induce them to believe that the facts of such dilatory plea were true.

DODGE v. MORSE.*Superior Court of Judicature of New Hampshire, 1825.**3 New Hampshire, 232.*

Assumpsit upon an account, annexed to the writ, of goods sold and delivered by the plaintiff's intestate to the defendant.

The defendant pleaded in abatement of the plaintiff's writ, that the promise in the declaration mentioned, if any such were made, was made by him jointly with several other persons, and not by him alone.

To this plea the plaintiff replied, that the promise was made by the said Morse alone, as alleged in the declaration; and upon this issue was joined.

* * * * *

By the COURT. On behalf of the defendant in this case it is urged, that the jury were misdirected, because they were instructed, that in case they found the issue in favor of the plaintiff, it would be their duty to give him in damages the value of the goods charged, without any further inquiry into the merits of the case. But this objection is altogether without any foundation. For it is well settled, that if issue be taken upon a plea in abatement, and the jury find for the plaintiff, they must assess the damages in the same manner, as when an issue is found for the plaintiff upon a plea in bar. 2 Wils. 367, *Eichorn v. LeMaitre*; 3 Saund. 210, g. note 3; Yelo. 112, *Tompson v. Colier*; T. Ray. 118; 1 Lev. 163.⁶²

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62. "On the other hand, if such an issue [an issue of fact] is found in favor of defendant, the judgment is that the suit abate or that plaintiff's writ be quashed." 23 Cye. 773.

CHAPTER IX.

REPLICATION AND SUBSEQUENT PLEADINGS.

SECTION 1. GENERAL PRINCIPLES.

HENRY v. OHIO RIVER RAILROAD COMPANY.

Supreme Court of Appeals of West Virginia. 1895.

40 West Virginia, 234.

BRANNON, J.

Darius Henry brought trespass on the case in the circuit court of Mason county against the Ohio River Railroad Company, and by direction of the court the jury found for the defendant, and judgment was rendered for it, and the plaintiff appeals. The suit was for damages to a lot and residence thereon, injured by an overflow of water caused, as alleged, by an embankment raised by the company, on which it laid its track.

A question of law in the case is this: The defendant pleaded not guilty, putting itself on the country, and issue was regularly joined on that plea. The defendant also filed a plea of the statute of limitations, but the plaintiff made no replication to it, and the want of such replication introduces trouble in the case. When this plea came in, being one of confession and avoidance, it demanded a replication either by way of traverse or confession and avoidance; but, standing without replication, judgment should have been rendered upon it for the defendant, as it is a rule in the science of common-law pleading that a pleading introducing new matter must be met by demurrer or by some response of fact. There was an objection to the plea, operating as a demurrer, which was overruled, and the plea received; but there was no replication, and, standing unanswered, it alone called for judgment for defendant. This judgment is based on the ground, under the system of pleading, that the plaintiff, by failing to reply to the plea, does not further prosecute his suit. A suit may not reach an issue. It may be cut short by failure

of one of the parties to pursue his litigation. As to the defendant, if he appears and fails to demur or plead to the declaration, or if, after plea, he fails to maintain the course of pleading required of him by the law of pleading, judgment called judgment by *nil dicit* (he says nothing) is given against him. This would be a judgment *quod recuperet*, both final in the cause and conclusive in a second suit. On the other hand judgment may be given against the plaintiff for not declaring, replying, surrejoining, or sur-rebutting, and this is called judgment by *non pros.* (*non prosequitur*—he does not prosecute). Steph. Pl. 108, 109; 4 Minor, Inst. 866; Tidd, Prac. 730. This judgment of *non pros.* is a species of nonsuit, and does not bar another suit. The matter of the unanswered plea is not taken for true; for, if it were, the judgment ought to be one of *nil capiat*, both final in the particular suit and a bar against another. It is based, not on the idea that the matter is true for all purposes, but only for failure to prosecute. It seems to be an unreasonable exception to that principle of the law of pleading which holds that whatever is well pleaded, and not denied, is taken to be true. 1 Saund. Pl. & Ev. 39. A much more logical principle would be to treat it as confessed, and render judgment final and conclusive, like the proceeding in chancery, where an answer is filed responsive to the bill alleging new matter, which, in absence of replication, is taken to be true, and final decree rendered upon it. *Cleggett v. Kittle*, 6 W. Va. 542.

At first thought, such judgment might be regarded as both final in the cause and conclusive upon the matter in controversy, as there is the declaration stating the cause of action, and the plea stating facts constituting a bar on its merits, and it remains unanswered, and we might expect a judgment of the law, which would ever be an end of controversy upon those facts; but such a judgment is not regarded as one on the merits, but only as a nonsuit, and, while final in the particular case, not conclusive upon the matter of action. It is treated as a nonsuit by 3 Bl. Comm. 296; by 4 Minor, Inst. 867; 2 Black, Judgm. sec. 702; 1 Freem. Judgm. sec. 261. Judge SUMMERS regarded it as a nonsuit in *Pinner v. Edwards*, 6 Rand. 675. All authorities hold that a nonsuit does not bar a second suit for the same cause. The authorities just given say that a judgment on *non pros.* will not defeat a second suit. The ques-

tion was fully discussed in *Howes v. Austin*, 35 Ill. 396, in a case where, just as in this case, the pleas were general issue, and a special plea in bar, and, the plaintiff failing to reply to the special plea in answer to a rule to reply, judgment was entered that the defendant go hence, not that the plaintiff take nothing by his suit. It was held to be a judgment of nonsuit, and not a bar to second suit. It was not necessary, before rendering such judgment of *non pros.*, to wait for trial on the plea of not guilty; for there was the plea of the statute, and no replication, and it alone called for judgment ending the suit. If there be two or more pleas, one a good bar to the whole declaration, though others be bad, or found against the defendant, he is entitled to judgment on that plea. He may now plead several defenses, and, if one only be good, that is enough to defeat the action. 2 Tuck. Bl. Comm. 260; Steph. Pl. 273; *Clearwater v. Meredith*, 1 Wall. 25. If the plea were bad, such judgment would be improper; but this was the ordinary plea that the action accrued more than five years before suit, and was on its face good and properly admitted. But the trial went on, notwithstanding there was no replication to the plea of the statute, court and parties treating the case as though there had been an issue on it, probably by mere inadvertence. After the introduction of the plaintiff's evidence, the defendant, without giving any evidence, moved the court to direct the jury to find a verdict for the defendant on the plea and issue joined on the statute of limitations, and the court instructed the jury to find such verdict, and it was found. The plaintiff in error says this verdict should be set aside, because there was no replication, and therefore no issue on the plea of the statute of limitations. * * * "Where a plea concludes with a verification, there cannot be a joinder of issue without a replication." *Lockridge v. Carlisle*, 6 Rand. 20; 1 Bart. Law Prac. 478, 480. * * *

So, tested by technical principles of common-law pleading, we shall say there was no issue on this plea. What then? What the result? There is considerable difficulty in reaching this result. It has been long and often held by our courts that when a judgment rests on a verdict of a jury sworn to try an issue joined in a case, criminal or civil, when no issue had in fact been joined, it would be ground for its reversal. *State v. Douglass*, 20 W. Va. 770;

Ruffner v. Hill, 21 W. Va. 152. So often and indiscriminately has it been held that the rule seems almost inexorable; but the courts have in some instances felt its inconvenience, in cases where there has been a fair trial on the merits. and no objection was made on that score in the trial court. In this case there was a plea of not guilty, and issue on it, and this plea of the statute, and all the evidence bearing on both, was heard, and a verdict responsive to issues under both pleas, had there been issues, was found; all parties treating the case as tried upon both pleas. In *Huffman v. Alderson*, 9 W. Va. 616, it was held that, though some of the pleadings conclude with a verification, and no issues are formally joined thereon, though joined on others, yet if the record states that the jury was sworn to try the issues, and the instructions show that the case was fully tried on the merits, including the defenses set up by the pleadings, on which no issues were joined, and the verdict responds, not only to the issues joined, but to the defenses on which issues were not joined, such verdict cures such defects under the statute of jeofails, it being a case of misjoinder of issue. In *Griffe v. McCoy*, 8 W. Va. 201, Judge HAYMOND referred, with some expression of disapprobation, to the rigor of former decisions upon this subject, and thought they might need revision. He says he would follow the principles in *Southside R. Co. v. Daniel*, 20 Gratt, 344. This was an action for damage to land caused by overflow from an embankment made for the railroad, as is this case, and, as in this case, the defendant pleaded not guilty, on which issue was joined, and a special plea, and there was a special replication, concluding to the country, but no rejoinder, nor any joinder of issue on it; but the parties went to trial, and the subject of the special plea and replication were contested before the jury, and there was a verdict for the plaintiff. The record, as here, showed that the jury was sworn to try the issue, not issues. It was held that, as there was no objection to the want of joinder in the court below, it could not avail in the appellate court. We know in the case in hand that the whole matter on this plea of the statute was contested, because the record states that the defense moved for a verdict "on the plea and issue joined on the statute of limitations," and the evidence covering that defense was before the jury. The case of *Moore v. Mauro*, 4 Rand. 488, supports this

view. The case of *Curry v. Mannington*, 23 W. Va. 14, might seem at first view to forbid the application of this doctrine to this case. There the defendant pleaded not guilty and the statute of limitations, and there was no replication or joinder of issue on either plea, and the verdict for plaintiff was set aside at defendant's instance. There the defendant was not chargeable with the omission to reply to the pleas, and he could with consistency avail himself of the defect; whereas, in this case, it was the plaintiff's duty to reply to the plea, and he is the party asking to have the verdict set aside, and take advantage of his own default in pleading, as the defendant could not rejoin till the plaintiff replied. This is a reason, in addition to others stated above, for not allowing the plaintiff for this cause to set aside the verdict. So it seems to me that the plaintiff cannot, under the circumstances, set aside the verdict.⁶³ * * *

63. See *Douglass v. Central Land Co.* (1878) 12 W. Va. 502, given *supra* in the text, on the question when a replication is necessary.

Forms. Replications should have formal commencement and conclusion. The commencement of a replication to a plea in bar is as follows: "Says that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against him, the said C D; because, he says, etc." This formula is called *precludi non*. The conclusion is: (in debt) "wherefore he prays judgment, and his debt aforesaid together with his damages by him sustained by reason of the detention thereof, to be adjudged to him." *Stephen on Pleading* (Tyler's Ed.) 347. See same reference for other forms.

HOLDING'S EXECUTOR v. SMITH.

Supreme Court of North Carolina. 1807.

1 Murphy, 154.

In this case among other pleas the defendant pleaded a set-off. To this plea the plaintiff replied—first, there was no such set-off, and secondly, the statute of limitations. To this replication the defendant demurred specially, and for cause of demurrer alleged that the replication was double.

LOCKE, J., delivered the opinion of the court.

According to the strict rule of pleading upon common-law principles, this replication is certainly bad; but it appears to be good under the provisions of our Act of As-

sembly, Iredell, 305. This act does not warrant a double replication to every plea, and perhaps allows it to no plea but that of set-off. This plea was allowed in England by Stat. 2d, Geo. 2d, Ch. 22, and adopted by our act of 1756, the preamble of which states that the object of introducing the plea was to prevent multiplicity of lawsuits; and wherever there were mutual debts subsisting, instead of compelling each party to sue, one debt was allowed to be set-off against the other, and this in lieu of an action, or rather cross-action. Every defendant therefore pleading a set-off is to be considered (so as respects this plea) in the light of a plaintiff, and bound to produce the same testimony to support it that would be required to enable him to recover in that character; and consequently the plaintiff against whom the set-off is pleaded, ought to be permitted by way of replication to make the same defence which the law would permit him to enter by way of plea, had he been originally sued. If, then, the present defendant had sued the plaintiff on this account, would he not, in the character of defendant, have been permitted to plead the general issue and statute of limitation? He surely would, and if so, he may reply the same to the plea of set-off. Let the demurrer be overruled.⁶⁴

64. *Statutory authority to plead double does not apply to replications and subsequent pleadings.* "On the subject of several pleas it is to be further observed, that the statute [4 Ann., c. 16, s. 4] extends to the case of pleas only, and not to replications or subsequent pleadings. These remain subject to the full operation of the common law against duplicity, so that, though to each plea there may, as already stated, be a separate replication, yet there cannot be offered to the same plea more than a single replication, nor to the same replication more than one rejoinder; and so to the end of the series. The legislative provision allowing several matters of plea was confined to that case, under the impression, probably, that it was in that part of the pleading that the hardship of the rule against duplicity was most seriously and frequently felt, and that the multiplicity of issues which would be occasioned by a further extension of the enactment would have been attended with expense and inconvenience more than equivalent to the advantage." *Stephen on Pleading* (Tyler's Ed.) 265.

SECTION 2. TRAVERSE DE INJURIA.

SELBY v. BARDONS.

*Court of King's Bench. 1832.**3 Barnwall & Adolphus, 2.*

Declaration in replevin for taking the plaintiff's goods and chattels in Verulam Buildings, Gray's Inn, in the county of Middlesex, and detaining the same against sureties and pledges. The fourth avowry and cognizance were by the defendant Bardons, as collector of the poor rates of that part of the parish of St. Andrew, Holborn, which lies above the bars, in the county of Middlesex, and of the parish of St. George the Martyr in the said county, and by the other defendant as his bailiff; and it stated that the plaintiff was an inhabitant of the said part of the parish of St. Andrew, Holborn, and by law ratable to the relief of the poor of that part of the said parish, and of the parish of St. George the Martyr, in respect of his occupation of a tenement situate in the said place in which, etc., and within the said part of the parish of St. Andrew; that a rate for the relief of the poor of that part of St. Andrew, Holborn, and of the parish of St. George the Martyr, was duly ascertained, made, signed, assessed, allowed, given notice of, and published according to the statutes; and that by the said rate the plaintiff was, in respect of such inhabitancy and occupation as aforesaid, duly rated in the sum of 7 *l.*; that Bardons, as collector, gave him notice of the rate, and demanded payment, which he refused; that the plaintiff was duly summoned to appear at the petty sessions of the justices of the peace for the said county, to be holden at a time and place duly specified, to shew cause why he refused payment; that he appeared, and shewed no cause; that a warrant was duly made under the hands and seals of two justices of peace for the county then present, directed to Bardons as collector, requiring him, according to the statute, to make distress of the plaintiff's goods and chattels; that the warrant was delivered to Bardons, under which he, as collector, avoided, and the other defendant, as his bail-

iff, acknowledged the taking of the goods as a distress, and prayed judgment and a return of the goods. The plaintiff pleaded in bar that the defendants of their own wrong, and without such cause as they had in their avowry and cognizance alleged, took the plaintiff's goods and chattels, etc. To this plea there was a special demurrer, and the causes assigned were, that the plea in bar tendered and offered to put in issue several distinct matters—the inhabitancy of the plaintiff; his chargeability to the relief of the poor, in respect of his occupation mentioned in the avowry and cognizance; the ascertainment, making, signing, assessing, allowance, notice, and publication of the rate; the rating and assessment of the plaintiff; the notice to him of the rate; the demand and refusal of the sum assessed; the summons, the appearance before the justices, the warrant of distress, and delivery thereof to the defendant Bardons. Another cause assigned was, that the plea in bar was pleaded as if the avowry and cognizance consisted wholly in excuse of the taking and detaining, and did not avow and justify the same, and claim a right to the goods and chattels by virtue of the statutes. To the fifth and sixth avowries and cognizances, which were similar in form to the fourth, the plaintiff pleaded *de injuria*; and there were special demurrers, assigning the same causes as above. The plaintiff joined in demurrer.

The case was argued in last Michaelmas term by Coleridge in support of the demurrer, and Maule *contra*. The judges not being agreed in their opinions, now delivered judgment *seriatim*. The points urged and the authorities cited in argument are sufficiently stated and commented on in the opinions delivered by them.

PATTESON, J.: The pleas in bar to the fourth, fifth, and sixth cognizances are so entirely at variance with one of the principal objects of special pleading, viz., that of bringing the parties to clear and precise issues of fact or of law, that I cannot bring my mind to consider them as maintainable upon principle. But if, upon the authority of decided cases, it should appear that they are maintainable, I am not prepared to overrule those cases upon any opinion that I may entertain respecting the inconvenience of so general a form of issue; and I am free to confess that, after an attentive examination of the authorities, I am of opinion that the pleas are maintainable.

The leading cases upon the subject (I mean *Crogate's case*, 8 Co. 132, for the year books throw little light on the subject) is by no means consistent in all its different parts, and much that is contained in the four resolutions is unnecessary to the decision of the case itself.

The pleadings were in substance as follows: Trespass for driving cattle. Plea, a right of common as copyholder in a piece of pasture into which the plaintiff had put his cattle; and that defendant, as servant of the commoner, drove them out. Replication, *de injuria sua propria absque tali causa*.

The first resolution is in substance this: that the replication *de injuria absque tali causa* refers to the whole plea; for all is but one cause. The second resolution is, that where any interest in land, or common, or rent out of or way over land is claimed, *de injuria* is no plea; for it is proper when the plea does consist of matter of excuse only, and no matter of interest whatever. The third resolution is, that where the defendant justifies under authority from the plaintiff, *de injuria* is no plea; so where he justifies under authority of law. The fourth resolution is, that the issue in the case then at bar would be full of multiplicity.

Upon the authority of this case, if the pleas in bar now under consideration be bad, they must be so on one of the following grounds:

Either that the avowries claim some interest, or that the defendant justifies under authority of law within the meaning of the third resolution, or that they are bad for multiplicity.

In the first place, as to any claim of interest, it is plain that the avowries claim no interest whatever in land, the sort of interest to which the second resolution is in words confined. But, supposing any interest in goods were within the spirit of that resolution, still, I apprehend that it must be an interest existing antecedent to the seizure complained of, and not one which arises merely out of that seizure; otherwise this plea could never be good in replevin where a return of goods is claimed, and, of course, an interest in them is asserted. Indeed, it seems to be considered in some textbooks that this plea in bar can never be used in replevin; but on reference to the authorities cited for that position, they all appear to be cases where an interest in land was claimed by the avowry. In this respect, I con-

fess that I cannot see any distinction between on action of replevin and one of trespass; and as the plaintiff can bring either at his election, it would be strange if he should be able by suing in trespass to entitle himself to the general form of replication, but if he sues in replevin should be debarred from it. * * *

As, therefore, the avowries in this case shew no interest in land or in the goods seized, except that which arises from claiming a return; and as I find no authority for saying, that such claim of return is an interest within the meaning of the second resolution in *Crogate's case*, it seems to me that the avowries shew matter of excuse only, and that, as to this ground of objection, the general pleas in bar of *de injuria* are good.

In the next place, are the general pleas bad on account of any authority in law shewn by the avowries?

It is certainly stated in the third resolution in *Crogate's case*, that the replication *de injuria* is bad where the plea justifies under an authority in law; but this, if taken in the full extent of the terms used, is quite inconsistent with part of the first resolution, which states, that where the plea justifies under the proceedings of a court not of record, the general replication may be used, or where it justifies under a *capias* and warrant to sheriff, all may be traversed except the *capias*, which cannot, because it is matter of record and cannot be tried by a jury. Now, proceedings of a court not of record, and the warrant to a sheriff and seizure under it, are surely as complete authorities in law as any authority disclosed by the present avowries.⁶⁵ * * *

In the last place, are the pleas bad on account of the issue, tendered by them, being multifarious?

If this were *res integra*, I should have no hesitation in holding that they were bad, and it cannot, I think, be denied

65. It is the fact of the authority of law appearing of record which is the controlling feature in this class of cases, for on the appeal of the principal case to the Exchequer chamber, Tyndal, C. J., giving the unanimous opinion of the judges, said: "That the dictum of Lord Coke cannot be intended of justification under all authorities in law generally, is abundantly clear from the instances already adverted to of justification under process of law against the person and goods of the plaintiff, so also of justification by peace officers arresting upon breach of the peace and the like. So also in the case of justification under a statute, in all which cases the general traverse is invariably replied to such pleas, where no matter of record forms part of it. If so, why may it not equally be replied where the justification is under a distress for a poor's rate being an authority of law." 3 Tyrwhitt, 430. 438.

that the present issues are as full of multiplicity as that in *Crogate's case*, and to which the fourth resolution there applied. But I am unable to find any instance in which the general replication has been held bad on that ground. The objection is indeed mentioned in the cases cited from Lord Chief Justice Willes's reports, but in no one of those cases does the decision proceed on that objection alone, and in all of them there were other undoubted objections. In *Cooper v. Monke*, Willes, 52, the plea justified under a distress for rent, and the general replication was clearly bad within the second resolution in *Crogate's case*. In *Cockerill v. Armstrong*, Willes, 99, the plea justified under a seizure of cattle damage feasant in a close of which the bailiffs and burgesses of Scarborough were alleged to be seized in fee; an interest, therefore, was claimed in the land, and the general replication was bad within the same resolution, and Lord Chief Justice EYRE in commenting on that case in *Jones v. Kitchin*, 1 Bos. & Pull. 80, expressly states that the replication was bad on that ground, and not because it put two or three things in issue, for that may happen in every case where the defence arises out of several facts all operating to one point of excuse. In *Bell v. Wardell*, Willes, 202, the pleas set up a custom, which was held bad, and, therefore, any decision as to the general replication became unnecessary.

It is every day's practice where the plea justifies an assault in defence of the possession of a close, or removing goods doing damage to it, to reply *de injuria* generally, and yet this objection as to the multifarious nature of the issue would apply in both cases. The same observation holds good where this general replication is used in actions for libel or slander, in which a justification is pleaded.

* * * * *

The present avowries state many facts undoubtedly, but they are all necessary to the defence, and combined together they shew but one cause of defence, namely, that the plaintiff's goods were rightfully taken under a distress for poor rates, and if the general replication be held bad in this case, I am at a loss to see in what case such a replication can be held good, where it puts more than one fact in issue. I am compelled, therefore, however reluctantly, to come to the conclusion, that the pleas in bar are good.

PARKE, J., after stating the pleadings, proceeded as follows:

The question for our decision is, whether the objections pointed out in the special demurrer, and which have been insisted upon in the argument before us, are well founded in law? It appears to me, upon an examination of the authorities, that they are not, and that the pleas in bar are good.

It is true that these pleas in bar put in issue a great number of distinct facts; and it is also true that the general rule is, that where any pleading comprises several traversable facts or allegations, the whole ought not to be denied together, but one point alone disputed: and I am fully sensible that the tendency of such a rule is to simplify the trial of matters of fact, and to save much expense in litigation. But it is quite clear, that from a very early period in the history of the law, an exception to this general rule has been allowed with respect to all actions of trespass on the case, in the plea of the general issue; and with respect to some actions of tort, in the replication of *de injuria sua propria absque tali causa*. This replication, where it is without doubt admissible, generally, indeed it may be said always, puts in issue more than one fact, and often a great number. For instance, in an action of assault, where there is a justification that the defendant was possessed of a house; that the plaintiff entered; that the defendant requested him to retire, and he refused; that the defendant laid his hands on the plaintiff to remove him, and the plaintiff resisted; all these facts may be denied by this general replication. Com. Dig. Pleader (F) 18; *Hall v. Gerard*, Latch. 128, 221, 273. So, where an obligation to repair fences, and a breach of the fences by the plaintiff is pleaded as an excuse for a trespass with cattle, Rastell, 621. a., Com. Dig. Pleader, 3 (M) 29. So if there be a justification of assault and false imprisonment, on the ground of a felony committed, and reasonable suspicion of the plaintiff, Br. Abr. De Son Tort, 49. So as to other justifications in the like action, *ibid.* 18, 20. Under the precept of an admiralty court, or under a precept after plaint levied in a county or hundred court, Rastell, 668 a., many facts may be put in issue by the general replication, and there appears no question about the validity of such a replication. *Crogate's case*, 8 Coke, 132. The case of *O'Brien v. Saxon*,

2 B. & C. 908, is a further authority to the same effect, that many facts may be included in one issue; and if many facts may be traversed, it can be no valid objection that more than usual are denied in any particular case.

* * * * *

The second ground is, that the avowry and cognizance claim an *interest* in the goods, and that for this reason the pleas in bar are not admissible. Upon the best consideration I have been able to give to the authorities on this subject which are (many of them) obscure and contradictory, I do not think that any interest is claimed in these pleadings, within the meaning of that word in the rules laid down on this subject. In *Crogate's case*, 8 Rep. 132, the principal authority, three cases are mentioned in which the general traverse is not allowed.

The first is, where matter of record is parcel of the issue; and that for the obvious reason, that if it were permitted, it would lead to a wrong mode of trial.

The second case is, where the defendant in his own right or as servant to another (who is by that decision put on the same footing as his master) claims an interest in the land, or any common, or rent going out of the land, or any way or passage upon the land.

The third case is, where, by the defendant's plea, any authority or power is mediately or immediately derived from the plaintiff. Under this description is included any title by lease, license, or gift from the plaintiff; Br. Abr. De Son Tort Demesne, 41, or lease from his lessee; 16 Hen. 7. 3. * * *

Lord Coke says, after laying down these three rules, that the general plea *de injuria, etc.*, is proper when the defendant's plea doth consist merely upon matter of excuse, and of no matter of interest whatever. By this I understand him to mean an interest in the realty, or an interest in, or title to chattels, averred in the plea, and existing prior to, and independently of the act complained of, which interest or title would be in issue on the general replication; and I take the principle of the rule to be, that such alleged interest or title shall be specially traversed, and not involved in a general issue.

It is contended, however, on the part of the defendants, that the interest here meant, is one that the party would acquire by the seizure which forms the subject of complaint,

and that the replication would be improper whenever the defendant justified under any proceedings by which, if rightful, he would acquire an interest or a special property.

If this were the meaning of the term "interest," a general replication would be bad to a plea to an action of trespass justifying seizure under process of the admiralty court, or of any inferior jurisdiction not of record. So in case of a justification of taking beasts in withernam (16 Hen. 7. 2). So of a justification of seizure for salvage, Lilly's Entries, p. 349. And yet in all these cases it appears to be settled that the general traverse is permitted.

It seems to me, therefore, that the objection is applicable to those cases only where a party justifies *as having* an interest, or under one who has an interest, by title at the time of the act complained of, *which interest would therefore be put in issue by the general traverse.*

* * * * *

LORD TENDERDEN, C. J.: I consider the system of special pleading, which prevails in the law of England, to be founded upon and to be adapted to the peculiar mode of trial established in this country, the trial by the jury; and that its object is to bring the case, before trial, to a simple, and, as far as practicable, a single question of fact, whereby not only the duties of the jury may be more easily and conveniently discharged, but the expense to be incurred by the suitors may be rendered as small as possible. And experience has abundantly proved, that both these objects are better attained where the issues and matters of fact to be tried are narrowed and brought to a point by the previous proceedings and pleadings on the record, than where the matter is left at large to be established by proof, either by the plaintiff in maintenance of his action, or by the defendant in resisting the claim made upon him. I am sensible that this principle has not always been kept in view by the courts, and that there have been, in practice, many instances of departure from it, founded upon very nice and subtle distinctions. The decisions of our predecessors, the judges of former times, ought to be followed and adopted, unless we can see very clearly that they are erroneous, for otherwise there will be no certainty in the administration of the law; and if I had found the question in this cause distinctly decided in any former case, I should have thought it my duty to abide by the decision, especially

in a matter regarding rather the course of proceeding than a question of pure law. But after an attentive consideration of the cases quoted at the bar, and of such others as I have been able to meet with after a very diligent search, I do not find that this has been done. I find, indeed, many decisions and *dicta* not easily reconcilable with each other, founded, as I have already observed, upon very nice and subtle grounds, and not capable of being reduced to any plain, or, to my mind, any solid principle. There is one matter in which all the authorities in our books agree. If an action of trespass be brought for turning sheep or cattle to feed upon land in the possession of the plaintiff, and the defendant justifies the act, by pleading that A. B., his landlord, was seised of certain lands, and demised the same to him for a term not yet expired, and that he thereupon entered and was possessed of the demised lands; and then goes on to allege, in the ordinary form of prescription, that his landlord had right of common on the plaintiff's land for cattle levant and couchant on the demised land, and that he put the cattle on the plaintiff's land in the exercise of that right; in such a case, I say, it is agreed by all the decisions that the plaintiff cannot reply generally *de injuria sua propria absque tali causa*, but must traverse some one of the facts alleged in the plea, admitting, for the purpose of the cause, all the others. In such a case at least three separate and distinct facts are alleged: the seisin of the landlord, the demise to the defendant, the immemorial right of common. Every one of these three is necessary to the defence; but the plaintiff must elect which of them he will deny, and when he has so done, the cause goes down to the jury for the trial of that single fact; the jury are not embarrassed by a multiplicity of matter, and the parties are relieved from much of the expense of proof, to which they would be subjected if all the facts alleged in the plea were to be matters of proof and controversy before the jury. In the case now before the court, the avowry alleged that a poor rate was made; that it was allowed by the justices; that the plaintiff was assessed in it for his messuage in which the distress was taken; that this messuage was within the parish; that payment of the assessment was demanded and refused; that a warrant of justices was issued to levy it, and that the goods were taken under the authority of that warrant. Many distinct and independent facts are

thus alleged in the avowry, every one of which is necessary to sustain the right to take the goods, and to entitle the defendant to have them returned to him; and if this general plea in bar be good, the defendant must prove every one of them at the trial, and the jury must consider and decide upon each before a verdict can properly be given. Now, I think I might safely venture to ask any plain and unlettered man, whether he could find any difference between the two cases that I have put, either in common understanding or in sound logic. For myself, I must say that I can find none. If no such distinction exists or can be found, why should a different rule prevail? Why should all the matters of fact be sent together to the jury in the one case and not in the other? To this question I am persuaded that no satisfactory answer could be given to the mind of an unlettered man. To a judge, who is to act upon the decisions of his predecessors, a binding if not a satisfactory answer might be given, by shewing that the matter had been already so decided; but this, as I conceive, has not yet been done.

* * * For the reasons which I have thus, perhaps, imperfectly given, and which are founded upon what I conceive to be principle, and not upon authorities, and which, therefore, render it unnecessary for me to advert to particular cases, I feel myself reluctantly bound to differ from my two learned brothers. * * *

*Judgment for the plaintiff.*⁶⁶

66. Affirmed by the unanimous opinion of seven judges in the Exchequer Chamber. 3 Tyrwhitt, 430.

The traverse *de injuria* has been held a proper replication to pleas of excuse in *assumpsit*. Griffin v. Yates (1835) 2 Bing. N. C. 579; Buckman v. Ridgefield Park R. R. Co. (1875) 38 N. J. L. 98; Bank of British North America v. Fisher (1850) 6 New Brunswick, 606; Paddock v. Jones (1868) 40 Vt. 474.

It was held in the early New York cases that defenses in justification, as distinguished from excuse, could not be replied to *de injuria*, but those cases are adversely criticized by the Supreme Court of the United States in *Erskine v. Hohnbach* (1871) 14 Wall. 618.

SECTION 3. DEPARTURE.

McADEN v. GIBSON.

*Supreme Court of Alabama. 1843.**5 Alabama, 341.*

[Detinue. Plea: Justification as sheriff under an attachment at the suit of Thomas Alford against the Mississippi and Alabama R. R. Co., issued on Oct. 19, 1840, for the recovery of a debt of \$500. Replication; *Precludi non* because the property in question did not belong to the said Railroad Co., a demand having been made before the levy of the attachment alleged in defendant's plea, to wit, on Oct. 12, 1840. Rejoinder: That on Sept. 21, 1840, two revenue attachments were issued at the suit of said Alford against said Railroad Co., one for \$1640, and the other for \$2200, both of which were received by defendant as sheriff and levied on the property in question. Demurrer.] ⁶⁷

COLLIER, C. J. * * *

* * * * *

A *departure* in pleading is said to be, when a party quits or departs from the case or defence which he has first made, and has recourse to another; it occurs when the replication or rejoinder, etc., contains matter not pursuant to the declaration or plea, etc., and which does not support or fortify it. One reason why a departure in pleading is never allowed, is, because the record would by such means be spun out into endless prolixity; for he who has departed from, or relinquished his first case or plea, might resort to a second, third, and so on *ad infinitum*; he who had a bad cause would never be brought to issue, and he who has a good one, would never obtain the end of his suit. (1 Chitty's Plead. 7th Am. Ed. 681; Co. Lit. 304, a; 2 Saund. Rep. 84, n. 1; 6 Com. Dig. tit. Pleader, F. 7, 8, 9, 10, 11, and the cases cited by these authors.) It is needless to extend this opinion by the citation of cases to show, that the rejoinder does not pursue and fortify the defence set

up by the pleas. This is sufficiently shown by the definition of a departure. The pleas are an attempt to justify under attachments issued, it is true, at the suit of the plaintiff, but on a different day and for a different amount. In fact it is conceded, that the rejoinders do not rely on the same process to defeat a recovery, as that which is insisted on by the pleas.

* * * The rejoinder is for the reasons already stated, bad on general demurrer. (See 6 Com. Dig. tit. Pleader, F. 10; 2 Saund. Rep. 84, n. 1, and cases there cited; 1 Chitty's Plead. 7 Am. Ed. 686, and cases there cited.)

* * * * *

ANONYMOUS.

Court of King's Bench. 1704.

3 Salkeld, 123.

In trespass, assault and battery, it was ruled by Holt, Ch. J., that where the plaintiff laid the assault to be done on such a day, and the defendant in pleading some special matter justifies on another day, so that now by this pleading the day is made material, yet the plaintiff in his replication may allege the assault to be done on another day, and that this is no departure; 'tis true it hath been held otherwise, but the later opinions are, that the day is not material, and that the plaintiff may maintain his declaration.

ANONYMOUS.

Court of Common Pleas. 1566.

3 Dyer, 253.

A lease was made by indenture for years without impeachment of waste, and one covenant was, that the lessee at every falling of wood should make a fence to save the spring; and he was bound for the performance of the cov-

enants. And in debt on bond he pleaded the indenture, and to the said covenant pleaded that he had not felled any wood, etc. And the plaintiff shewed the felling of two acres of wood, and that the defendant did not make any fence to save the spring; and the defendant rejoins, that he made a fence, etc., and of that he puts himself upon the country; and the aforesaid plaintiff does the like, therefore let twelve, etc. And this was holden a jeofail and departure; and the jury at the bar discharged for this in the Bench.

VERE v. SMITH.

Court of King's Bench. 1671,

2 Levinz, 5.

Debt upon an obligation, by the plaintiff a brewer, against the defendant his clerk, conditioned to perform covenants, to account for all sums of money he should receive. Defendant pleads covenants performed. The plaintiff replies that such a day 26 *l.* came to his hands, for which he has not accounted. The defendant rejoined, that he accounted *modo sequente*, viz., that certain malefactors broke into his countinghouse and stole it, wherewith he acquainted the plaintiff, *et hoc paratus est verificare*; upon which the plaintiff demurred: and now it was argued, 1st that the rejoinder is a departure, for fulfilling a covenant to account, can't be intended but by actual accounting; whereas the rejoinder does not shew an account, but an excuse for not accounting; 2, * * * *Cur' contra*. To the 1st, this is an account, and no departure. * * *

TRUSTEES OF R. E. BANK v. HARTFIELD.

Supreme Court of Arkansas. 1844.

5 Arkansas, 551.

By the Court, SEBASTIAN, J.: This is an action of assumpsit on promissory note, to which the statute of limita-

tions was pleaded. The plaintiff in the circuit court replied specially, a payment made by defendants within the three years preceding the institution of the suit. To this there was a demurrer sustained, and whether the fact replied is a good answer to the plea, and whether it is well pleaded, are the only questions arising in the cause.

* * * * *

As to the objection which has been raised to the replication, that it is a departure from the declaration, we think it is not tenable. The matter is, as it is clearly settled, a good answer to the statute of limitations, and rendered necessary to be replied to by the plea of the defendant. A departure in pleading is when a party quits or departs from the case or defence which he has first made. 1 Ch. Pl. 635; and a departure can never be in a matter which maintains and fortifies the declaration or plea. Com. Dig. Pleader, F. 11. Now here is no resting upon a ground different from, or inconsistent with, that occupied in the declaration, but the replication sets up a matter affirming the cause of action upon the same grounds, and denying the matter alleged in the plea. When a new promise is relied upon as an answer to the statute of limitations, the declaration is founded upon the original cause of action, and the new promise is set forth in the replication or adduced in evidence as a simple denial of the truth of the plea. *Barrett v. Barrett*, 8 Greenleaf, 355. A part payment stands upon the footing of an acknowledgment or promise, to avoid the statute, and according to this rule may be replied or given in evidence. The plea alleges that the defendants did not undertake, etc., within three years next before the commencement of the suit; and a payment within that time either pleaded or proved in evidence, directly contradicts the plea. There can be no departure in a replication when it simply denies the plea. The effect of payment, whether regarded as a renewal or the continuation of the old contract, is still a denial of the plea. Doubtless it is more proper to introduce a part payment in evidence, under the general replication, without specially pleading it, and this would be necessary if such payment stood alone upon the footing of a proof. This, however, is not the case. By our statute, and the law as established by judicial decisions up to that time, it amounted in legal effect to a promise. It was such by implication of law. We,

therefore, cannot see why it may not be replied as a distinct answer to the statute, with as much propriety as if it were given in evidence under the usual replication. We are, therefore, of opinion, that the matter contained in the replication was well pleaded, and sufficient to take the case without the operation of the statute. For that reason the judgment must be reversed, etc., and the court instructed to overrule said demurrer, etc.

Judgment reversed.

BURDICK v. KENYON.

Supreme Court of Rhode Island. 1898.

20 Rhode Island, 498.

STINESS, J.: The plaintiff sued as administrator *c. t. a.* of Robert N. Langworthy, upon a promissory note given December 21, 1887, by the defendants Kenyon and Chapman, as principal and surety, averring promises to the testator, and the defendants pleaded the statute of limitations. The plaintiff replied by averring a promise within six years to himself. The defendants joined issue, and the case went to the jury, resulting in a verdict for the plaintiff. The defendants move for a new trial upon the ground that the replication was a departure from the declaration, as stated above, and also upon the ground that the verdict was against the evidence.

A replication which avers a promise to one person, while the declaration avers a promise to another, is clearly a departure in pleading. And the rules of pleading have made no exception in the case of a representative plaintiff, who stands in the place of, and who for all legal purposes is a continuation of, the original promisee, although such an exception would seem to be both reasonable and just. The textbooks agree that where an executor sues in *assumpsit* upon promises to the testator, to which the statute of limitations is pleaded and the reply is a subsequent promise to himself, the replication is a departure and bad. 1 Chit. Pl. 675; Steph. Pl. 410; Gould Pl. chap. viii, sec. 67.

The defendants filed a demurrer to the declaration, but

the record does not show that it was passed upon, and, even if it was, no exception having been taken, objections to the rulings must be regarded as waived.

Another rule, also well settled, is that when a party takes issue upon a replication or rejoinder containing a departure, and it is found against him, the court will not arrest the judgment. The verdict cures the fault. 1 Chit. Pl. 679; Gould Pl. Chap. VIII, sec. 79.

* * * * *

In *Kannaugh v. Quartette Mining Co.*, 16 Col. 341, the court said: "If it be conceded that the replication is a departure from the cause of action as pleaded in the complaint, this could only have been taken advantage of by demurrer, motion, or otherwise, before trial. If this had been done, the complaint might have been amended and the omission supplied. It was not done. By voluntarily going to trial with the pleadings as they were, the defendant must be held to have waived such objections. This is true at common law as well as under the code."

We are of opinion that the petition for a new trial, upon the ground that there was a departure in pleading, must be denied.

This being so, and the pleadings being treated as though they had been regular, the evidence is sufficient to sustain the verdict, and the second ground must also be denied.

Petition dismissed, and case remitted to the common pleas division for further proceedings.

POTTS v. POINT PLEASANT LAND COMPANY.

Supreme Court of New Jersey. 1885.

47 New Jersey Law, 476.

REED, J.: The declaration is for breach of covenant. It sets out a contract under seal, by the terms of which the plaintiff was to perform for the defendants certain work in filling and grading certain lots and claying certain sidewalks at Point Pleasant. It then declares that the defendants did covenant, in consideration of the faithful performance of the said work, to pay eighteen cents per cubic yard for the sand or clay removed, the payment to be made by a deed of real estate, by an assignment of certain mortgages, by orders for guano and the payment of cash.

It then avers the due performance of the work on the part of the plaintiffs, and the failure of the defendants to perform their covenant to make payment according to the terms of their contract. To this declaration the defendants pleaded, among others, the plea that the performance of the work was a condition precedent to the plaintiffs' right to payment, and that the plaintiffs had not performed the said work.

To his plea the plaintiffs replied that although they tendered themselves ready and willing to complete the said work, the defendants notified them to remove from the defendants' land all the plaintiff's material, tools and working implements, by reason of which they were prevented from continuing said work according to the terms of the contract. To this replication a demurrer was filed.

The point of the demurrants upon the argument was that the ground upon which the plaintiffs based their right of action in their replication, was a clear departure from the position taken by them in their declaration.

The counsel for the plaintiffs contended that the replication fortified the case made by the declaration, and so was legitimate. The design of a replication is to put upon the record some new facts which show that, notwithstanding the existence of the matters pleaded by the defendants, the declaration is yet true.

Thus if plaintiff declares upon a statute, and defendant pleads that it is repealed, a replication that it has been revived by a subsequent act, is good. For the reviving act gives renewed effect to the first, on which the action is founded. Gould on Plead. 455.

So, if in trespass the defendant justifies for a distress damage feasant, the plaintiff may reply that the defendant afterward converted to his own use, for this shows the taking to be a trespass *ab initio*. Comyn's Dig., tit. "Pleader," paragraph 11.

These are obvious instances of a fortification of the position first taken by the pleader. But in the two pleadings of the plaintiffs in the present case it appears manifest that the grounds upon which the plaintiff rests his claim is in each distinct. He assumes on each that he has a condition to perform as a precedent to his right to recover compensation. He first says "I performed it." He next says, "I did not perform it, but was ready to do so, and you hindered me."

The performance of such a condition, and an excuse for not performing it, are matters so distinct that good pleading requires the certain averment of that one upon which the party relies. They are so treated by Mr. Chitty, he giving the rules that regulate the pleading of a performance of conditions precedent, and also the averments necessary in setting out an excuse of performance by the plaintiff. In regard to the latter he remarks: "In stating an excuse for nonperformance of a condition precedent, the plaintiff must in general show that the defendant either prevented the performance or rendered it unnecessary to the prior act by his neglect or by his discharging the plaintiff from performance." Chitty on Plead., p. 326.

But the point involved here is not new. Thus, Mr. Gould, citing Co. Litt. 304a, and 1 Sid. 10, says: "If in covenant broken the defendant pleads performance in general terms, and the plaintiff replies nonperformance of a particular act, a rejoinder that the defendant was ready to perform, and tendered performance, and that the plaintiff prevented it, is a departure from the plea; performance, and tender and refusal being distinct and inconsistent grounds of defence. The matter rejoined should have been pleaded in the first instance." Gould on Plead. 455.

In the present case the plaintiffs rest their case upon performance of a preceding covenant. In the case mentioned by Mr. Gould the defendant rested his defence upon the performance of his covenant.

In neither case could the parties in a subsequent pleading shift their ground of attack or defence from performance to an excuse for nonperformance.

There should be judgment for the defendants with costs.

VIRGINIA FIRE AND MARINE INSURANCE
COMPANY v. SAUNDERS.

Supreme Court of Appeals of Virginia. 1890.

86 Virginia, 969.

Error to judgment of circuit court of Mecklenburg county rendered October 17, 1888, in an action on a policy of insur-

ance, wherein Mrs. Sarah K. Saunders and husband were plaintiffs, and the Virginia Fire and Marine Insurance Company (plaintiff in error here) was defendant. This case has once before been to this court. See 84 Va. 210. Opinion states the case.

LEWIS, P., delivered the opinion of the court.

After the case went back to the circuit court, the plaintiff replied anew to the defendant's special pleas, and the question again is as to the sufficiency of the replications. On the former appeal the judgment was reversed, because the replications concluded to the country, instead of with a verification, as they ought to have done, inasmuch as they introduced new matter. The replications subsequently filed, and upon which we are now to pass, set up the same matters, and are in all respects the same as those first filed, except that they conclude with a verification.

The first plea sets up a warranty by the plaintiff as to the cost of the property, alleging that whereas she represented it, in the written application for insurance, to be \$1,600, it was, in fact, much less. And the second alleges that this representation was material to the risk and untrue. The policy recites that the application shall be treated as a part of the policy, and that its statements shall be treated as warranties by the assured that the facts therein stated are true.

To the first plea the plaintiff replied, in substance, that when the application was made, she expressly informed the agent of the company who procured her signature to the application, that she could not tell with certainty what the property cost, but that she estimated it at \$1,600; that this estimate was concurred in by the agent, who himself inserted it in the application, which was signed by her; that he, the said agent, then and there fully inspected and examined the property, and was as fully informed as to its value and cost as the plaintiff herself was; that the defendant, through its agent, also had knowledge of the real condition and situation of the risk, and that, with such knowledge, the property was valued by its agent at the said sum of \$1,600, and insured accordingly. Wherefore it is insisted "that the said defendant is concluded and estopped from alleging the matter set up in the said plea."

The replication to the second plea is substantially to the same effect.

The defendant moved to reject these replications, but the motion was overruled, and to this action of the court an exception was taken. The case was thereupon submitted to a jury, and a verdict rendered for the plaintiff for \$1,000, the amount of the policy, upon which verdict the court entered judgment.

The principal assignment of error relates to the action of the circuit court in overruling the motion to reject the replications. It is contended that the replications are defective, because, instead of answering the contention raised by the pleas as to the cost of the property, they undertake to set up in estoppel an alleged valuation of the property by the defendant's agent. And this, it is contended, constitutes a departure in pleading, for which the motion ought to have been granted.

A learned author lays it down that the only mode of taking advantage of a departure is by demurrer. 4 Min. Inst. 1040. But be that as it may, here there has been no departure. To the general rule which requires the pleader either to traverse or to confess and avoid, there are several exceptions, one of which arises in the case of pleadings in estoppel. Steph. Pl. 219. Indeed, it is one of the essential qualities of a replication, that it must present matter of estoppel, or must traverse or confess and avoid the plea. 1 Chit. Pl. 643. Moreover, a departure takes place only when the party deserts the ground that he took in his last antecedent pleading and resorts to another. Thus, the replication must be conformable to the declaration, the rejoinder to the plea, etc. Or as Lord Coke expresses it: "Each party must take heed of the ordering of the matter of his pleading, lest his replication depart from his count, or his rejoinder from his bar; *et sic de caeteris*. 3 Th. Co. Litt. 435; 4 Min. Inst. 1038.

In the present case this rule has been observed; that is to say, there has been no abandonment of the case stated in the declaration, and a resort to another, but the matter contained in the replication conforms to and fortifies that contained in the declaration. There was no error therefore, in overruling the motion to reject the replications.

Judgment affirmed.

SECTION 4. NEW ASSIGNMENT.

MARKS v. MADSEN.

*Supreme Court of Illinois. 1913.**261 Illinois, 51.*

CARTWRIGHT, J., delivered the opinion of the court.

This is an action of trespass *quare clausum fregit*, brought by Delia D. Marks, the appellee, in the circuit court of Cook county, against James P. Madsen, the appellant. The declaration described the premises as a certain close of the plaintiff situated in Cook county, to which she had title, under the statute of limitations, by adverse possession for twenty years. The defendant filed a plea of the general issue and a plea of *liberum tenementum*. To the plea of freehold the plaintiff filed a general replication. Afterward, by leave of court, the plaintiff filed an additional count, in which the premises were described in the same general way and the title alleged was the same as in the original declaration. To the additional count the defendant filed a plea of the general issue, a plea of *liberum tenementum*, * * *. On the trial the plaintiff introduced evidence of record title to the west forty feet of lot 18 in block 1, in a subdivision of a tract of land described by the government description, in Cook county, and the defendant introduced evidence of like record title to the east ten feet of the same lot and the adjacent lot 19. There was no description of any particular tract, piece or parcel of land in the declaration or additional count, and there was no new assignment by the plaintiff describing the premises upon which the trespass was alleged to have been committed. Evidence was introduced by both parties relating to a dispute as to the boundary line between the two portions of the tract. There was a verdict for the plaintiff for \$300, on which judgment was entered, and an appeal was allowed and perfected.

* * * * *

The court refused to direct a verdict for the defendant and also denied the defendant's motion for a new trial, and these rulings present the question whether the defendant made a complete defense under his pleas of *liberum tene-*

mentum. The plaintiff alleged a trespass upon a close in Cook county, which would be well enough as against a wrongdoer, but the defendant by his pleas alleged that he was the owner of said close. The plea answered the declaration and if proved was a complete defense. The rule has always been that if a declaration be general, without naming the *locus in quo*, and the defendant has any land in the same jurisdiction, the plaintiff must always make a new assignment, setting out the *locus in quo* with more particularity. (Chitty's Pl. 595.) The plea confessed that the plaintiff had such possession of a close in Cook county as would enable her to maintain trespass against a wrongdoer, and asserted a right of freehold in the defendant with a right of immediate possession, carrying with it a right to enter, as a justification for the trespass. (*Fort Dearborn Lodge v. Klein*, 115 Ill. 177.) The issue under the plea was whether the premises described in the declaration were defendant's freehold, and the premises being described generally, the defendant could show title to any land in the jurisdiction. (*Ellet v. Pullen*, 12 N. J. L. 357; *Helwis v. Lombe*, 6 Mod. 117; 1 Saund. 299; *Austin v. Morse*, 8 Wend. 476; *Goodright v. Rich*, 7 T. R. 323; 38 Cyc. 1093.) The office of a new assignment is to furnish a particular description of the premises, and the plaintiff having given no such description in the declaration or additional count, could not succeed without such new assignment. * * * There is good reason in the rule requiring a new assignment where the defendant proves title to land fitting the description in the declaration, in the fact that the judgment, where the plea of *liberum tenementum* is filed and the ownership of the land is tried, is *res judicata* of the location of the boundary line. (*Herschbach v. Cohen*, 207 Ill. 517.) The court was in error in the rulings on the motion to direct a verdict and the motion for a new trial.

*The judgment is reversed and the cause remanded.*⁶⁸

68. See a critical and historical note on this case in 9 Illinois Law Review, 46.

SPENCER v. BEMIS.

*Supreme Court of Vermont. 1873.**46 Vermont, 29.*

[Trespass for breaking and entering plaintiff's close, tearing down his fence, etc. Pleas: (1) Not guilty and (2) that at the time when, etc., there was, and of right ought to have been, a common and public highway over the *locus in quo*, and because the said way was obstructed by said fence in said declaration mentioned, the defendant pulled down the same. Reply to second plea: (1) *De injuria*. (2) New assignment. Special demurrer to replication.]⁶⁹

BARRETT, J.: The case is before us on special demurrer to the replication. The declaration counts on a single act of trespass, without continuation or repetition. The defendant justifies, setting forth by plea an alleged right of way, and that the alleged trespass was the doing what he lawfully might do in removing obstructions placed across said way by the plaintiff. The plaintiff replies, denying the alleged way and right, and that the fence named in the declaration and plea was across or obstructing any highway, with *de injuria*, and closing with verification and prayer for judgment. This is followed by new assignment, alleging that the action is brought, not only for the trespasses justified by the plea, but also for that the defendant on the several days and times mentioned in the declaration, on other and different occasions, etc., following the form in 3 Chit. Pl. 1218.

By traversing the plea, as well as by what is said in the new assignment, the plaintiff is still pursuing the justified trespass as being one for which he brought his suit. That being so, it is not permissible to him to bring upon the record other acts of trespass, they not being within the scope of the declaration. New assignment means specially designating a cause of action within the scope of the declaration, and other than the one covered by the plea. But when the declaration embodies only a single act of trespass, and the plaintiff by his replication treats that as a cause of action for which he brought his suit, the declara-

69. Condensed statement of facts by the editor.

tion is thereby exhausted. There is no subject-matter remaining on which a new assignment can operate. And it is in this respect that the plaintiff seems to have fallen into mistake. The precedent in 3 Chit. Pl. 1218, which he followed, is a proper one for a proper case. But that is when the declaration may embody more than a single act of trespass. In the present case, either the plaintiff should not have traversed, or not new assigned. It was at his option which to do. If the trespass justified in the plea is the one sued for, then a traverse would be proper. If the trespass sued for was *extra viam*, then he might new assign. In such case he would be pursuing for a single act of trespass, which, under the declaration, may have been *intra*, or *extra viam*. This whole subject is well developed in 1 Chit. Pl. 626 to 634, and is illustrated by the precedents and notes in Vol. 3.

* * * * *

The judgment is reversed, with leave to reply anew, and the cause remanded.

PUGH v. GRIFFITH.

Court of King's Bench. 1838.

7 Adolphus & Ellis, 827.

TRESPASS. The declaration charged that defendant, on 1st October, 1835, and on divers other days and times between, etc., with force and arms, etc., broke and entered a dwelling house of plaintiff, situate, etc., and made a great noise, etc., and stayed and continued therein, making such noise, etc., for a long, etc., and forced and broke open, broke to pieces and damaged, divers, to wit, ten doors of plaintiff, of and belonging to the said dwelling house, and broke to pieces, damaged and spoiled divers, to wit, twenty locks, twenty bolts, twenty staples, and twenty hinges, of and belonging to the said doors respectively, and where-with the same were then fastened, and of great value, etc., and also, during the time aforesaid, to wit, on, etc., seized and took divers goods and chattels, to wit, etc., of plaintiff, and carried away and converted, etc.

Plea 1. As to coming with force and arms, etc., and whatever else is against the peace, etc., and as to seizing, taking, carrying away, and converting, etc. (a part of the goods). Not guilty.

Plea 2. As to the residue, that heretofore, and before any of the said times when, etc., Robert Jones sued out in the Court of Exchequer a writ of *fi. fa.*, directed to the sheriff of Montgomeryshire, to levy of the goods and chattels of plaintiff 55 *l.* 1 *s.* 4 *d.*, indorsed to levy the whole and 7 *s.* for costs, etc., which was delivered to defendant, being then, and thence until and at and after the times when, etc., sheriff of Montgomeryshire, to be executed; by virtue of which writ, afterwards, and before the return of the said writ, to wit, at the said time when, etc., in the declaration first mentioned, defendant then lawfully being in a certain room in and parcel of the said dwelling house in which, etc., and which said room then was occupied by one Elizabeth Davies as tenant thereof to the plaintiff, defendant, so being such sheriff as aforesaid, peaceably and quietly entered into the residue of the said dwelling house in which, etc., through the door communicating between the said room so occupied by the said Elizabeth Davies and the residue of the said dwelling house in which, etc., the same being then open, in order to seize and take in execution the said goods and chattels of plaintiff in the introductory part of this plea referred to, the same then being in the said dwelling house in which, etc., for the purpose of levying the said monies so directed to be levied by the said writ and the said indorsement so made thereon as aforesaid, and did, at the said times when, etc., seize and take in execution the said last mentioned goods and chattels, and, by sale thereof, levy a certain sum of money, to wit, etc., part and parcel of the damages, etc., and, in so doing, and because certain doors of and belonging to the said dwelling house in which, etc., at the said time when, etc., were shut, locked, and fastened with the said locks, bolts, staples, and hinges in the said declaration mentioned, so that defendant, so being in the said dwelling house in which, etc., could not seize, take, and carry away the goods and chattels aforesaid, to levy the monies aforesaid, or execute the said writ, without forcing and breaking open the said doors, defendant, while he so continued in the said house as aforesaid, at the said time when, etc., and for the purpose afore-

said, did force and break open the said doors, and, in so doing, did necessarily a little break and damage the same; and also a little break to pieces, damage, and spoil the said locks, bolts, staples and hinges of and belonging to the said doors respectively, doing no unnecessary damage to the plaintiff in that behalf; and also, in the said execution of the said writ, defendant, so being such sheriff, did necessarily and unavoidably make a little noise, etc., and stay, etc., for the space of time in the declaration mentioned, as he lawfully, etc., which are the said, etc.

The plaintiff joined issue on the first plea; and, as to the second, replied that he brought his action, not for the trespasses in the second plea mentioned and attempted to be justified, but for that defendant, on the said several days and times, etc., with force and arms, etc., broke and entered the outer door of the said dwelling house in the declaration mentioned, and also broke and entered the said dwelling house, and made the said noise, etc., therein in the declaration mentioned, and stayed and continued, etc., making the said noise, etc., on other and different occasions, and at other and different times, and in other and different parts of the said dwelling house in the declaration mentioned than in the second plea mentioned, and therein attempted to be justified, in manner and form as the said plaintiff hath above thereof in his declaration in that behalf complained against defendant; which said several trespasses above newly assigned are other and different trespasses, etc. Verification.

Plea to the new assignment. As to all except breaking the outer door of the said dwelling house, in which, etc., and entering the same, as in the new assignment, etc., not guilty. As to breaking the outer door, etc., and entering, etc., as in the new assignment is alleged, etc., that, the said *fieri facias* having so issued and having been so delivered to defendant, so being sheriff, etc., and defendant having peaceably and quietly entered into the said dwelling house in which, etc., to seize and take in execution the goods and chattels of plaintiff in the second plea mentioned, in the manner and for the purpose therein also mentioned, defendant, at the said times when, etc., did seize and take in execution the said goods and chattels as in that plea is alleged, under and by virtue of the said writ; and, because the outer door of and belonging to the said dwelling house

in which, etc., at the said time when, etc., in the said new assignment mentioned, was shut and fastened, so that defendant, so being in the said dwelling house, etc., as aforesaid, and having so seized, etc., as aforesaid, could not take and carry away the goods and chattels aforesaid in order to levy the monies directed to be levied by the said writ and indorsement, or execute the said writ, without opening the said outer door, and because neither plaintiff nor any other person on his behalf was in the said dwelling house at the same time when, etc., so that defendant could request plaintiff or such other person to open the said outer door, defendant, so being in the said house at the said time when, etc., for the purpose last aforesaid, did open the said outer door, and, in so doing, did necessarily and unavoidably a little break the same, doing no unnecessary damage, etc.; and defendant did then take and carry away the said goods and chattels for the purpose aforesaid, and in order to levy, etc.; and, in so doing, defendant did necessarily and unavoidably go out of and re-enter the said dwelling house by the outer door thereof, the said outer door being open at the time of such re-entry, in order to take and carry away the said goods and chattels for the purpose aforesaid, and as he lawfully, etc., which are the same supposed trespasses, etc.

The plaintiff joined issue on the traverse; and, as to the second plea to the new assignment, new assigned again, that he brought his action, not for the trespasses in the introductory part of the second plea to the said new assignment mentioned, etc., but for that defendant, on the several days and times in the declaration and in the said new assignment in that behalf mentioned, with force and arms, etc., broke to pieces, damaged, and spoiled the locks, bolts, staples, and hinges in the declaration mentioned, which said locks, bolts, staples and hinges were appertaining, belonging, and fixed to the said outer door of the said dwelling house in the declaration and in the said new assignment mentioned, and wherewith the same was fastened, in manner and form as plaintiff hath above thereof in his declaration, etc., complained, which said several trespasses lastly new assigned are other and different trespasses than the said trespasses in the said second plea to the said new assignment mentioned, etc.

To this second new assignment, the defendant pleaded, first, not guilty: secondly, as to breaking, etc., one lock, one

bolt, and one staple, parcel of the locks, bolts, and staples in the said last new assignment mentioned, and as is therein alleged, that the said *fieri facias* having so issued, and been so delivered to defendant, being sheriff, as in the said second plea is mentioned, and defendant having peaceably and quietly entered into the said dwelling house in which, etc., to seize and take in execution the goods and chattels of plaintiff in the second plea mentioned, in the manner and for the purpose therein also mentioned, defendant, at the said times when, etc., did seize the said goods and chattels, as in that plea is alleged, under and by virtue of the said writ; and, because the outer door of and belonging to the said dwelling house in which, etc., at the said time when, etc., in the last new assignment mentioned, was shut and fastened with the said one lock, one bolt, and one staple, in the introductory part of this plea mentioned, so that defendant, so being in the said dwelling house in which, etc., and having so seized, etc., the said goods and chattels as aforesaid, could not take and carry away the said goods and chattels in order to levy or execute the said writ, without opening the said outer door, nor could defendant, upon that occasion open the said outer door so being fastened as aforesaid, for the purpose last aforesaid, without a little breaking, etc., the said last mentioned lock, bolt, and staple, and because neither plaintiff nor any other person on his behalf was in the said dwelling house at the said time when, etc., so that defendant could request plaintiff or such other person to open the said outer door, defendant, so being in the said house as aforesaid, at the said time when, etc., and for the purpose last aforesaid, did open the said outer door, and, in so doing, did necessarily and unavoidably a little break, etc., the said last mentioned lock, bolt, and staple, then appertaining and belonging to the said outer door, and wherewith the same was so fastened as aforesaid, doing no unnecessary damage, etc., and as he lawfully, etc., which are the said supposed trespasses, etc., and whereof plaintiff hath above by his said last new assignment complained, etc.

The plaintiff joined issue on the traverse; and, as to the rest of the plea demurred, assigning for cause that defendant acknowledged the breaking to pieces, etc., one lock, one bolt, and one staple, appertaining, belonging, and fixed on the outer door of the dwelling house of plaintiff, and wherewith the same was fastened, as in the declaration and in

the second new assignment alleged, and attempted to justify the same breaking, etc., under the execution of a writ of *feri facias* directed to the sheriff, etc. Joinder in demurrer.

* * * * *

LORD DENMAN, C. J., in this term (January 31st), delivered the judgment of the court. After going through the pleadings his lordship said:

Upon this state of the pleading, it appears that the defendant, in his plea to the declaration, has justified breaking and entering the house, and seizing the goods, under a writ of *feri facias*. He does not allege in the plea that the outer door was open, which is generally necessary; but he says that he was lawfully in a part of the house in the occupation of a lodger; and, if the communication between the part of the house occupied by the lodger and the rest of the house should be in the nature of an outer door for the protection of the plaintiff's house, there is an averment in the plea that the communication between the two was open, and therefore the entry into the part occupied by the plaintiff was authorized. The plaintiff, in answer to this, says the matters justified in the plea are not what he complains of; but he says he brought his action, not for that, but for breaking the outer door, and entering the house on other occasions, and at other times, and in different parts of the house. The defendant's answer to this new assignment is what has been already stated; that, in order to take the goods out of the house, it was necessary to open the outer door; and, as neither the plaintiff nor anybody on his behalf was there, so as a request could be made to them, he opened it. The plaintiff, in answer, says, by another new assignment, that he did not bring his action for that, but for breaking the locks, bolts, staples, and hinges of the outer door.

It is to be observed that, in the first new assignment, the plaintiff says nothing about the locks, bolts, staples and hinges; and, as the plaintiff has in that new assignment confined his complaint to breaking the outer door, and breaking and entering the house, he cannot carry his second new assignment beyond the first new assignment. A question may at first appear to arise, whether this second new assignment is not bad altogether: but we think not, because, under the complaint of breaking the outer door, the

plaintiff might give evidence of breaking the locks, etc., fixed to and part of the door.

Then the defendant, in answer to this, pleads as before stated: so that the general question, whether a sheriff who has seized goods under a *feri facias* has a right to break an outer door to take them out of the house, when there is nobody of whom to request that the door may be opened, would not appear to arise; for the plaintiff, by his second new assignment abandons that complaint, and the only question on this record would now appear to be, whether he has a right to break the lock, bolt, and staple of the outer door to take out the goods. But, though the plaintiff has abandoned the general complaint of breaking the outer door of the house, yet, under the objection he makes as to breaking the lock, bolt and staple, he may contend that the sheriff had no right to break the outer door; and, though he has abandoned the general breaking open the door, he has not admitted, in the pleadings, as he might have been held to do if he had pleaded over in answer to the defendant's pleading; but here his pleading over is that the defendant has not given any answer to what the plaintiff means to complain of, and that he has mistaken the nature of the plaintiff's complaint, and that it ought to be considered in the same light as if there was a *nolle prosequi* as to the whole of the trespasses except breaking the lock, bolt, and staple of the outer door; and, as to that, we think that he may stand in the same situation as if his declaration had been originally confined to the mere act of breaking the lock, bolt, and staple of an outer door of the house.

It appears to us that, on the allegations on this record which are not denied, the sheriff had a right to break open the outer door, and to break the lock, bolt, and staple affixed to it. The sheriff shews a lawful entry into the house, and a lawful seizure of the goods; and, in his plea to the first new assignment, he says that he could not take the goods out of the house without opening the outer door; the particular door therefore is identified, so that it cannot be said there were any other doors, or any other mode of getting the goods out. Then what was the sheriff to do? The goods could not be kept forever in the house; and neither the plaintiff, nor anybody else, was there so that he could request them to open the door, and there was nothing else to be done but to open it himself; and he says that he did

no unnecessary damage; and then, as to the complaint of breaking the lock, bolt, and staple, that he could not open the outer door without breaking, damaging, and spoiling them; and as to that also he alleges the absence of the plaintiff and every other person to whom he could make a request; and therefore, as to that also, which is now the only cause of complaint, he appears to be justified as a matter of necessity in order to get the goods out to execute the writ. * * *

* * * * *

Upon the whole of the case, we are of opinion that there should be judgment for the defendant.

*Judgment for defendant.*⁷⁰

70. "A new assignment may be made in most actions, whether in form *ex contractu* or *ex delicto*, but it more frequently occurs in trespass; and in replevin, as the plaintiff must show the place in certain where the taking was, it is said there can be no new assignment as to the place. If in an action of *assumpsit* for goods sold, the defendant has pleaded a judgment recovered, and in fact the plaintiff has obtained a judgment in another action, though for different goods and causes of action, the plaintiff ought not to reply *nul tiel record*, but should new assign that his present action is brought for the nonperformance of other and different promises. So if in case for the publication of a libel, without mentioning the particular person to whom it was published, the defendant has pleaded that he published it lawfully, as to members of a committee of the house of commons, and the plaintiff proceeds for a publication to other persons not members of the committee, he should reply or rather new assign such illegal publication." 1 Chitty on Pleading, 602-603.

CHAPTER X.

AMENDMENT, AIDER AND REPLEADER.

SECTION 1. AMENDMENT.

BETTS v. HOYT.

Supreme Court of Errors of Connecticut. 1840.

13 Connecticut, 469.

This was an action on a promissory note. The declaration alleged, that the defendant, in and by a certain writing or note, by him well executed, dated the 20th day of June, 1838, promised the plaintiff, for value received, to pay him the sum of 213 dollars, with interest; as by said writing or note, ready in court to be produced, will appear; nevertheless, the defendant, his said promise and undertaking not regarding, hath never performed the same, nor paid said sum of money, or any part thereof, though often requested and demanded so to do.

The defendant pleaded *non assumpsit*; and on that issue, the cause went to the jury, who returned a verdict for the plaintiff, for 236 dollars, 53 cents, damages. The defendant moved in arrest of judgment, on the ground of the insufficiency of the declaration in this, viz., that it did not appear, by the averment thereof, that the promise set forth therein, had been, at the commencement of this action, broken, by the defendant; nor at what time the money, by such promise payable, was, by such promise, due or demandable. The court adjudged the motion sufficient; and judgment was arrested accordingly.

The plaintiff thereupon filed a motion for liberty to amend his declaration, by inserting therein next after the words "promised the plaintiff, for value received, to pay him the sum of 213 dollars, with interest," these words, viz., "on demand." The defendant objected to this motion, claiming that no such amendment could, at this time, be legally made.

The questions arising on this motion were reserved for the consideration and advice of this court.

* * * * *

CHURCH, J.: The allowance, or disallowance, of amendments, is within the discretionary power of the courts, in the absence of statute regulations. The time, beyond which an amendment may not be allowed, has not been prescribed, by any statute of this State. At common law, amendments of pleadings have been permitted, at any time before judgment. Co. Litt. 280. 1 Peters d. Abr. 504, 539a. And the same has been permitted, in special cases, in the State of New York, and by the courts in other States. 18 Johns. Rep. 510; 2 Cowen, 515; 4 Cowen, 124; 7 Cowen, 483, 518.

In this State the courts, in the exercise of their discretionary power, in ordinary cases, have refused to sanction amendments of pleadings, after they have been adjudged insufficient, upon motion in arrest. 1 Sw. Dig. 779. And the present motion discloses nothing, which should induce us to depart from established practice, in such cases; and by doing so, we fear we might encourage a negligence and laxity in pleading and practice, which would prove very inconvenient, both to the bar and the court; and we must therefore, advise the superior court to deny this motion.

But, at the same time, had the motion set forth facts, which had satisfied us that a serious and irretrievable loss would have resulted to the plaintiff, from a refusal of this amendment, beyond the mere loss of a bill of costs, and the expense and delay of commencing and prosecuting another action; such as a loss of the debt, by the operation of the statute of limitations, or discharge of the lien created by attachment, etc.; we should have believed, that a just exercise of the discretionary power of the court, would have sanctioned the amendment prayed for. In the case of *Aubeer v. Barker*, 1 Wils. 149, the court said, that it was a rule of that court, that a new count could not be added, after two terms; and yet this had been permitted, to prevent the loss of the debt, by the statute of limitations. The *Duke of Marlborough's Exrs. v. Widmore*, 2 Stra. 89; 1 Petersd. Abr. 531; *Dartnall v. Howard et al.*, 2 Chitt. Rep. 28.

In this opinion the other judges concurred.

Amendment not allowed.

LOHRFINK v. STILL.

*Court of Appeals of Maryland. 1857.**10 Maryland, 530.*

BARTOL, J., delivered the opinion of this court.

This is an action for a malicious prosecution. The declaration was defective in not averring that the alleged malicious prosecution was "without probable cause." That such averment was essential is not now, and has never been, doubted. It constitutes the gist of the action. 2 Chitty's Pl. 608, 609, note (x); 2 Saund. Pl. & Ev. 652, 654, 659; 7 Cowen, 717.

After the jury had been sworn, and all the evidence offered to them, the plaintiff asked leave to amend the declaration, by inserting the words, "without any reasonable or probable cause whatsoever," and "that the declaration might be taken to read as if said averment were made," and the court granted leave to amend at bar as prayed. The defendant objected to the amendment being made, without first withdrawing a juror, which objection the court overruled. The defendant also objected to the making of said amendment in the manner proposed, which objection the court overruled, and the defendant excepted. The court directed the trial to proceed before the same jury without their being resworn, to which also the defendant excepted.

The first question presented by these exceptions is, whether the leave to amend the declaration operated as an amendment. It is clear that a permission to amend does not, *per se*, amount to an amendment. A party may have leave to amend, and yet not choose to avail himself of it. The amendment must actually be made, either by altering the declaration in the cause, or by filing a new one.

In this case no amendment was, in point of fact, made in conformity with the leave granted by the court. The declaration remained unchanged; and as it now appears in the record, it contains no averment of "want of probable cause," without which it is insufficient.

We think the court erred in treating the leave to amend as an actual amendment, and for that reason the judgment ought to be reversed.

* * * * *

Judgment reversed and procedendo awarded.

FLANDERS v. COBB.

*Supreme Judicial Court of Maine. 1896.**88 Maine, 488.*

FOSTER, J.: The plaintiff and defendant traded horses. The defendant was to pay seventy-five dollars to the plaintiff as the difference between horses, and in lieu of the money turned over a negotiable promissory note of eighty dollars, which he held against one Joseph Frost. The note was not then due, and the defendant endorsed it in blank. The note was not paid at maturity, nor was the defendant seasonably notified so as to hold him as an indorser.

The plaintiff claims that while the trade was going on the defendant represented that the maker of the note was a man of means and financially responsible, and that these statements were false and fraudulent, and made with intention of deceiving him, and that he relied upon them and was thereby deceived and injured.

On the other hand, the defendant asserts that he made no misrepresentations; that what he said was but the honest expression of an opinion; that the plaintiff neglected seasonably to notify him so as to hold him as an indorser of the note, and that in consequence of that neglect this suit was brought in which he seeks to collect his debt.

The action was originally framed in assumpsit, the declaration containing three counts. At the second term the presiding justice allowed an amendment of the writ by striking out the three counts and substituting therefor a count in case for deceit. To the allowance of this amendment the defendant's counsel seasonably objected, on the ground that it changed the form as well as introduced a new cause of action.

The case is before us upon exceptions as well as report.

I. The first question, and one of vital importance, is, whether this amendment was allowable.

We think it was not.

Our attention has been called to no case under our system of practice that goes to the extent of authorizing the court to allow an amendment which changes the nature of the action from assumpsit to tort. The case of *Rund v.*

Webber, 64 Maine, 191, was never intended to authorize amendments to the extent of allowing the form or nature of the action to be changed. Upon examination of the facts in that case, it will be found that the amendment there was but the correction of an error in the writ, the correction of an amendment (improperly made) to the original declaration, so as to restore the declaration as originally framed and prevent a change in the nature of the action from what seemed to be its form as originally drawn, and to escape the statute of limitations that might be pleaded to another suit. The original count was more in the nature of deceit than *assumpsit*, and the last amendment was but a restoration to its former self—the spirit taking on form “in the furtherance of justice.” “As the special count stood,” say the court, “it could easily be amended so as to have been an action of deceit.” In *Dodge v. Haskell*, 69 Maine, 429, 434, this court, in referring to *Rand v. Webber*, *supra*, remarked that it “has been erroneously supposed to allow an amendment to the extent of allowing the nature of the action to be changed. That case merely allowed a correction of the writ, already improvidently and improperly amended, that such a result might be avoided.”

In the present case, the change is absolute from *assumpsit* to an action on the case for deceit. It is not a restoration of form as originally drawn. The cause of action, as originally stated, was clearly and distinctly set forth in appropriate counts based upon an alleged promise. There was no defect to be amended, or correction of the cause of action as originally stated, as in *Rand v. Webber*, *supra*. The amendment was not the correction of a defect in pleading, but the addition of a cause of action not set forth in the original declaration, as well as a change of the nature of the cause of action. This was clearly wrong. While the greatest liberality is allowed in the matter of amendments, the authorities are abundant and uniform, that no new cause of action can be introduced by way of amendment against the objection of the defendant.

In *Houghton v. Stowell*, 28 Maine, 215, it was held that a change in the form of action from debt to case was unauthorized, and that the court had no authority to allow it.

A fortiori, in the present case, would it be unauthorized to allow an amendment which changes the nature of the action from *assumpsit* to an action on the case for deceit.

The plea of the defendant in the former case is "never promised," while in the latter, it is "not guilty." At common law the court had no power to allow an amendment which introduced a new cause of action. Com. Law Pl. sec. 142. Nor has this been extended by statute in this State. *Farmer v. Portland*, 63 Maine, 46; *Cooper v. Waldron*, 50 Me. 80. Neither can counts which are in form *ex contractu* be joined with those in form *ex delicto*. *Corbett v. Packinton*, 6 Barn. & Cress. 268; 1 Ch. Pl. 201. Unless this rule is observed confusion would arise in the forms of pleas and judgments which the different forms of actions require.

The remedies and forms of action which have been afforded to parties, and which have been sanctioned by long usage and approved by the highest authorities, should be adhered to, and it is not the province of the court, upon reasons of supposed convenience or occasional hardship, to dispense with them, and to substitute one for another, varying the rights of one or both of the parties.⁷¹

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71. *Accord*: *Hess v. Birmingham Ry. L't & Power Co.* (1906) 149 Ala. 499; *Dewey v. Nicholas* (1871) 44 Vt. 24; *Slater v. Fehlberg* (1903) 24 R. I. 574.

Contra: *Kirwin v. Raborg* (1802) 1 H. & J. (Md.) 296; *Morse v. Whiteher* (1888) 64 N. H. 591; *North v. Nichols* (1872) 39 Conn. 355.

CHOBANIAN v. WASHBURN WIRE COMPANY.

Supreme Court of Rhode Island. 1911.

33 Rhode Island, 289.

JOHNSON, J.: This is an action brought to recover damages, as appears in the writ dated August 2, A. D. 1906, and returnable to the superior court, Providence county, September 11, A. D. 1906, for personal injuries sustained by the plaintiff while in the employ of defendant on the twentieth day of April A. D. 1905, through the negligence of said defendant.

* * * * *

At the time he was injured he was working in a pit, in what is called the open hearth room, in defendant's steel

plant, and was inexperienced in that kind of work. This is a long, large rectangular-shaped building with earthen floors, and contains two earthen pits in which cast-iron ingot molds are set to receive pourings of steel from the furnaces which are located just south of and above the pits. These two pits are known as pit number 1 and pit number 2. The plaintiff was injured while at work in pit number 2.

* * * * *

Plaintiff was in the pit setting ingot molds preparatory to the pouring when injured. The work of the person setting was to stand in the bottom of the pit and guide the mold as it was lowered into the pit by the crane man, so that it would rest properly in its place upon the iron plate in the bottom of the pit.

The molds that were being lowered into the pit to the plaintiff had passed through a heating that night and plaintiff used bagging to protect his hands when placing the molds in position. He had set five molds and was setting the sixth one, which would be the second mold in the second row, when he was injured. The crane man had lowered this sixth mold and when it rested upon the plate the trunnions upon that mold were not in line with the trunnions upon the mold next to it.

The plaintiff signalled the crane man to raise the mold a little so as to align it. The crane man then raised the mold and when he lowered it the second time the brick was out of the bottom of the mold upon the plate, the mold struck upon the brick, the hooks came off the trunnions and the mold toppled over upon the plaintiff, who was between the mold and the side of the pit and the upper end of the mold fell upon plaintiff's right arm and pinioned it against the side of the pit. The weight of the mold crushed the arm, and the heat of the mold burned the arm to the bone before the mold could be removed. As the hooks had come off the trunnions when the mold fell over, the crane man was powerless to handle the mold or to move it from off the plaintiff's arm until two of the other pit men jumped into the pit and affixed the hooks to the trunnions, and the mold was then removed from the plaintiff's arm. The plaintiff was taken to the Rhode Island Hospital, where his arm was amputated that day.

* * * * *

The defendant's second exception is to the decision of the superior court denying the defendant's motion to strike

out three certain counts of the plaintiff's declaration, designated as "First Additional Count," "Second Additional Count," and "Third Additional Count," respectively. Said counts were filed on March 20, 1909, to an amended declaration then on file in said case, said filing being more than two years after the accident. In said three additional counts the plaintiff set forth the following additional specifications of negligence, viz.: that improper hooks were used in connection with the trunnions and specifying in what particulars the hooks were improper; the employment of incompetent fellow servants, and the defendant's failure to properly inspect.

The defendant's motion to strike out said additional counts was based upon two grounds, first, that in each of said additional counts the plaintiffs stated a cause of action different from the causes of action stated in the amended declaration, and, second, that said additional counts were not filed within two years after the causes of action in said additional counts had accrued.

The rule is stated in 1 Ency. Pl. & Pr. 564, as follows: "As long as the plaintiff adheres to the contract or the injury originally declared upon, an alteration of the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action. The test is whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony."

In *Columbus v. Anglin*, 120 Ga. 785, the question was whether an amendment to the declaration was properly allowed under a statute providing that "no amendment adding a new and distinct cause of action, or new and distinct parties, shall be allowed unless expressly provided for by law." The plaintiff sued for damages for personal injuries resulting from the fall of a shed built over a sidewalk. The negligence alleged in the original declaration was that the municipal authorities had changed the grade of a certain street and put insufficient drains therein, so that the surface water was allowed to pond near and upon the sidewalk and cause a washout, which the municipal authorities negligently filled with unsuitable material, thereby causing the support of the shed to settle, and as a result the wooden shed fell upon the plaintiff. The trial court allowed an

amendment setting forth a further ground of negligence, in this, that the defendant had failed in its duty to inspect said shed and permitted said street to be dangerous by allowing said shed to stand and that from said neglect of duty said shed fell and injured the plaintiff. The court held that the amendment was properly allowed and that no new and distinct cause of action is added by an amendment containing additional matter descriptive of the same wrong originally pleaded. The rule is laid down that when, in an action *ex delicto*, the declaration sets out certain acts of negligence, to show a violation by defendant of the plaintiff's right, such petition may be amended by setting out additional acts of negligence to show substantially the same violation of the same right. The reasoning of the court is shown in the following excerpts from the opinion: "So long as a plaintiff pleads but one wrong, he does not set up more than one cause of action. Courts will look to the allegations both as to the primary right of the plaintiff and the corresponding primary duty of the defendant, and as to the violation or breach thereof, in order to determine whether it is the intention to plead but a single wrong only, or more than one. A single wrong may, however, be composed of numerous elements and shown by various facts. Facts, alone or in conjunction with purely substantive law, do not give a right of action, but are alleged in order to show a wrong which has called into operation the remedial law which gives the right of action. The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The thing, therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill, or indictment, but the result of these in a legal wrong, the existence of which if true, they conclusively evince.'" Sibley, Right to and Cause for Action, 48. Different facts may be alleged, separately or cumulatively, to show the same wrong, and the manner and variety of the facts alleged will not make more than one cause of action, so long as but one wrong is shown. A single wrong will not be made plural by alleging that it is made up of a number of constituent parts." * * * "If there is a substantial identity of wrong (which necessarily includes identity of the right violated), there is substantial identity of cause of action.

In *Smith v. Bogenschutz*, 19 S. W. (Ky.) 667, the plaintiff, a laborer in defendant's foundry sued to recover damages for personal injuries caused by an overflow of molten iron from a ladle in which it was being carried. The negligence alleged in the original petition was the failure of the defendant to widen a narrow and dangerous passageway so as to render it safe for the employees in carrying molten iron in ladles from one part of the building to another. The court held that an amendment alleging that the overflow was due to a defect in the ladle was not an introduction of a new cause of action. The court said, "The injury to the plaintiff was caused by the spilling or the boiling over of this molten iron in the ladle in which it was being carried; and the allegation that the overflow of the liquid was caused by the narrowness of the passageway bringing the workmen too close together in carrying it, if untrue, was not the real cause of the injury, and did not estop the plaintiff from alleging that this overflow was produced from a different cause; nor did it change the character of the action. It is at least the same cause of action, viz., the injury to the plaintiff by the overflow of this liquid. If the plaintiff had been injured by a defect in a particular part of the machinery connected with this foundry—a fact known to the defendant—the averment as to the cause of the defect or the character of the negligence would not preclude the plaintiff from alleging that the defect in the machinery was to be attributed to another cause than that alleged, or that the negligence of the defendant, with reference to the particular machinery, was different from that alleged; it is but one cause of action."

In *Wilson v. N. Y., N. H. & H. R. R. Co.*, 18 R. I. 598, one of the grounds of the defendant's petition for a new trial was the allowance by the trial court of the filing by the plaintiff of an amended declaration, against the defendant's objection. In behalf of the defendant it was contended that the amendment was improper in that it was in a matter of substance rather than of form, and that it amounted to the statement of a new cause of action. An examination of the papers of the case shows that the original declaration was in two counts, the first count alleging that the defendant was negligent in that it carelessly, negligently and improperly propelled, drove, managed and conducted the said engine, etc., so that the same was driven

upon and against the plaintiff, and the second count set up as a ground of negligence the act of the defendant in leaving the gates open at a certain railway crossing and in inviting the driver of the sleigh in which the plaintiff was riding to cross the track and negligence in running and controlling its cars. The additional count which was filed as an amendment set forth a distinct ground of negligence in that the defendant failed to place a flagman at the grade crossing as required by law and the order of the town council of Cumberland. The court said, "The amended declaration sets forth with more particularity than in the original declaration the matters in which it is alleged the defendant was guilty of negligence but does not change the form of action or introduce a new cause of action." *Atlantic Mills v. Superior Court*, 32 R. I. 285.

The great weight of authority is to the effect that the allowance of an amendment to a declaration setting forth an additional ground of negligence as the cause of the same injury does not amount to the statement of a new cause of action. *Smith v. Missouri Pac. Ry. Co.*, 56 Fed. 458; *Cross v. Evans*, 86 Fed. 1; *Columb v. Webster Mfg. Co.*, 84 Fed. 592; *Berube v. Horton*, 199 Mass. 421; *Daley v. Gates*, 65 Vt. 591; *McIntire v. The Eastern Railroad*, 58 N. H. 137; *Babb v. Paper Co.*, 99 Me. 298; *Kuhns v. Ry. Co.*, 76 Iowa, 67; *Sheffield v. Harris*, 112 Ala. 614; *Greer v. Railroad Co.*, 94 Ky. 169; *Pickett v. Railway*, 74 S. E. 236; *Lee v. Republic Steel Co.*, 241 Ill. 372; *Tanner v. Harper*, 32 Col. 156; *Straus v. Buchanan*, 96 App. Div. (N. Y.) 270; *Davis v. R. R. Co.*, 110 N. Y. 646; *Galveston, etc., R. R. Co. v. Perry*, 85 S. W. (Tex.) 62; *District of Columbia v. Frazer*, 21 App. D. C. 154; *Texas, etc., Ry. Co. v. Cox*, 145 U. S. 593.

The cases cited by defendant's counsel are not in our opinion in conflict with the cases cited *supra*. The amendments which it was held could not be granted, in every case set out causes of action which were clearly separate and distinct from those set out in the declaration to which they were offered.

In *Wright v. Hart's Admr.*, 44 Pa. St. 454, the court said: "This claim was three years old when the suit was brought, nine years old when the declaration was filed, and twenty-one years old when the amendment was allowed on which the recovery was had. It could not therefore be introduced by amendment, unless it plainly appears that the

amendment is a mere specification of a claim already substantially counted upon." The note declared on was dated October 10, 1837, and was for \$541.34, payable to Lewis Darragh and endorsed to the plaintiff. The note set out in the amendment was made by Lewis Darragh, dated October 16, 1837, and was for \$525.

In *Allen v. Tuscarora Valley R. Co.*, 229 Pa. St. 97, the declaration was at common law for injury resulting from the negligence of defendant in using a coupler more dangerous than the usual coupler employed on railroads. The amendment alleged that the railroad was engaged in interstate commerce and its cars were equipped with couplers in violation of the act of Congress of March 2, 1893. Such a change was held to be a departure in law.

In *Quimby v. Claflin*, 27 Hun (N. Y.), 611, plaintiff had leave below to amend by adding as a third cause of action, a further claim against the defendant for \$34,000, which said claim was barred by the statute of limitations. The court held that the amendment was improperly allowed.

In *Pratt v. Cir. Judge*, 105 Mich. 499, the amendments offered stated that the plaintiff was in the exercise of due care and did not in any way contribute to the injury. The court say: "The declaration, as amended, relates to precisely the same state of facts and no new theory is evolved by the proposed amendments which simply amplify the averments contained in the original declaration by statements in no way inconsistent with those originally set out. It is a question of acknowledged difficulty to ascertain in just what cases an amendment may be said to set out a new cause of action, but we think the result of the authorities is well summarized in 1 Enc. Pl. & Pr. 564, as follows" (quoted by us *supra*): "And, when the amendment does not introduce a new cause of action, the running of the statute of limitations is arrested at the date of the institution of the suit. See 1 Enc. Pl. & Pr. 621."

In *Buel v. Transfer Co.*, 45 Mo. 562, the court say: "Whether an amendment by relation takes effect from the commencement of the suit, or only from the term of its filing, depends on circumstances. The rule is this: When the amendments set up no new matter or claim, but is a mere variation of the allegations affecting a demand already in issue, then the amendment relates to the commencement of the suit, and the running of the statute is arrested

at that point; but when the amendment introduces a new claim, not before asserted, then it is not treated as relating to the commencement of the suit but as equivalent to a fresh suit upon a new cause of action—the running of the statute continuing down to the time the amendment is filed.”

Inasmuch as the three additional counts did not introduce any new or different cause of action, the superior court did not err in overruling the defendant’s motion to strike out said counts, even though the period of limitations had expired. *Atlantic Mills v. Superior Court*, 32 R. I. 285. The rule is stated in Ency. Pl. & Pr., vol. 1, p. 621, “Where an amendment has been properly made and is for the same cause of action, the amended pleading is regarded as a continuation of the original pleading and takes effect as of the date when the latter was filed.” *Clark v. Delaware, etc., Canal Co.*, 11 R. I. 36. “Where an amendment does not set up a new cause of action, or bring in any new parties, the running of the statute of limitations is arrested at the date of filing the original pleading.” Ency. Pl. & Pr., vol. 1, p. 621; *Berube v. Horton*, 199 Mass. 421; *Lee v. Republic Steel Co.*, 241 Ill. 372; *Sheffield v. Harris*, 112 Ala. 614; *Quimby v. Claflin*, 27 Hun (N. Y.), 611; *Buel v. Transfer Co.*, 45 Mo. 562.

* * * * *

COX v. MURPHY.

Supreme Court of Georgia. 1889.

82 Georgia, 623.

SIMMONS, J.: Murphy sued Cox for damages. In his original declaration he alleged, in substance, as follows: On the streets of Savannah he was attacked by a wild and ferocious steer, the property of S. H. Zoucks and D. Cox, or one of them; that it was in the possession of Cox’s servants; that the defendants knew that the animal was ferocious and dangerous and had a propensity for attacking persons, but that they attempted to drive it through the public streets of Savannah. The declaration then shows how the plaintiff was injured and damaged. The plaintiff amended

his declaration by alleging that Cox had damaged him in the sum named, because he carelessly kept the steer, well knowing that it was accustomed to attack, gore and trample mankind, and while so keeping it, it attacked, gored and trampled upon the plaintiff. He offered a second amendment, wherein he alleged that Cox was the owner or had in his custody, care, keeping or control this animal, and so negligently kept it that it escaped and unlawfully came upon the streets and injured the plaintiff, who was lawfully walking thereon. In a third amendment, he alleged that the defendant kept a vicious and dangerous steer, which, by the careless management of the defendant or his agents in attempting to drive it along the streets, was allowed to escape and go at liberty, upon which it attacked, gored and trampled on the plaintiff, who was walking along the street, without any fault on his part. * * *

* * * * *

We think the court was right in allowing the first and third amendments to the declaration. It will be remembered that the original declaration alleged that this was a wild and ferocious steer, and that the defendant knew that it was ferocious and dangerous and had a propensity for attacking persons. The first and third amendments, while they go more into detail as to the manner of the plaintiff's injury, both alleged that the steer was wild and ferocious, and that this was known to the defendant; and we think, therefore, they were germane to the original declaration, and did not introduce any new cause of action. They simply allege more particularly than the original declaration did, the escape of the steer and the fault of the defendant in allowing him to go at large. Both adhere to the vicious character of the animal.

The second amendment, however, does not make these allegations, but alleges that the steer was so negligently kept that it escaped and unlawfully came upon the streets and injured the plaintiff. We think it was error to allow this amendment; for it alleged an entirely distinct cause of action from the original declaration. As said before, the original declaration and the first and third amendments charged the defendant with knowingly keeping a vicious animal and allowing it to go at liberty; the second amendment does not allege that the defendant knew that the animal was vicious, or even that as a matter of fact it

was vicious; but alleges that the defendant kept it so negligently that it escaped and injured him. The plaintiff could not recover, under the original declaration and the first and third amendments, without proving to the satisfaction of the jury that the defendant knew that the animal was vicious and allowed it to escape or go at large. Under the second amendment he might perhaps recover by simply proving the negligent keeping and escape, and the injury. Under the original declaration and first and third amendments, it was necessary to prove the scienter of the defendant; under the second amendment this was unnecessary. We therefore think that the second amendment contained a new and distinct cause of action, and should not have been allowed. * * *

* * * * *

Judgment reversed.

DALEY v. GATES.

Supreme Court of Vermont. 1893.

65 Vermont, 591.

ROWEL, J.: The original declaration charges that the defendant enticed away plaintiff's husband, *per quod consortium amisit*. The new count charges criminal conversation with him with the same *per quod*.

An amendment cannot be allowed that introduces a new cause of action. But as long as the plaintiff adheres to the contract or the injury originally declared upon, an alteration of the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action. The test is whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony. *Cassell v. Cooke*, 8 S. & R. 268 (11 Am. Dec. 610); *Stewart v. Kelly*, 16 Pa. St. 160 (55 Am. Dec. 487); *Maxwell v. Harrison*, 8 Ga. 61 (52 Am. Dec. 385); *Stevenson v. Mudgett*, 10 N. H. 338 (34 Am. Dec. 155 and note).

This rule is variously illustrated by the cases. Thus, in *The Executors of the Duke of Marlborough v. Widmore*, 2

Stra. 890, the plaintiffs declared as executors on a promise to the testator, but were allowed to amend by declaring on the promise as made to themselves. So in *Ten Eyck v. Delaware & Raritan Canal Co.*, 4 Harr. (N. J.) 5, plaintiff was allowed to amend by declaring for another injury occasioned by the same wrongful act originally complained of. In an action for goods sold and delivered you may amend by adding a count for not accepting the goods. *Mixer v. Howarth*, 21 Pick. 205. So in covenant, you may amend by assigning new breaches of the same covenant. *Stewart v. Kelly* cited above. You may also amend by declaring on another covenant in the same instrument, if both covenants and the breach thereof relate to the same thing. *Boyd v. Bartlett*, 36 Vt. 9; *Tillotson v. Prichard*, 60 Vt. 94. A declaration on a warranty can be amended by showing that the warranty covered things not originally declared for. *Church v. Syracuse Coal and Salt Co.*, 32 Conn. 372.

If an action of this kind can be maintained by a wife, concerning which we are not called upon to express an opinion, the cause of action is the wrongful deprivation of the plaintiff of that to which she is entitled by virtue of the marital relation, namely, the consortium, or the conjugal society, affection, aid and assistance of her husband. *Bennett v. Bennett*, 116 N. Y. 584; *Rinehart v. Bills*, 82 Mo. 534 (52 Am. Rep. 385); *Foot v. Card*, 58 Conn. 1 (18 Am. St. Rep. 258); *Westlake v. Westlake*, 34 Ohio St. 621 (32 Am. Rep. 397); note to *Shaddock v. Clifton*, 94 Am. Dec. 593; Bigelow's Lead. Cas. on Torts, 337; Cooley, Torts (1st Ed.), 224; 1 Chit. Pl. (134).

It follows, therefore, that the injury complained of in the original declaration and the injury complained of in the new count are one and the same injury, namely, the loss of consortium, and that the new count is but the statement of another way in which that injury was committed, of another ground for demanding the same thing, namely, damages for said loss, the identity of the cause of action being preserved.

If you can amend by declaring for another injury occasioned by the same wrongful act, why can you not amend by declaring for the same injury as occasioned by another wrongful act? And this you virtually do when you amend by assigning a new breach of the same covenant; but you

are seeking the same thing all the time, namely, damages for the breach of that covenant.

That the new count in this case is for the same cause of action is as clearly shown by the record as it could be dehors the record.

Affirmed and remanded.

DOWNING v. BURNHAM.

Supreme Court of Vermont. 1911.

84 Vermont, 149.

MUNSON, J.: The declaration contained counts in trespass *quare clausum*, alleging the cutting and removal of trees and growing timber; a count in trespass *de bonis*, alleging the removal of saw logs, wood and timber; and a count in trover, alleging a conversion of like property. When the case was reached for trial, plaintiff moved to amend by striking out the last two counts, and the defendants objected, for that the counts of trespass on the freehold and the count in trover were not and could not be for the same cause of action, and so were improperly joined, and that consequently the declaration could not be amended as proposed without changing the cause of action.

The question presented is purely one of pleading, no jurisdictional question being involved. It is not necessary to inquire whether the counts are for different causes of action; for the striking out of one of two counts, whether it be for a separate cause of action or not, does not change the cause of action set up in the other count; and we think the rule forbidding an amendment which changes the cause of action cannot preclude a plaintiff from perfecting his declaration by abandoning a count for a different cause of action, which has been mistakenly added. The amendment was properly allowed. Chitty 206; Gould, Ch. 4, sec. 101; See *Abbott v. Keith*, 11 Vt. 525; *Haskell v. Bowen*, 44 Vt. 579; *Rowley v. Shepardson*, 83 Vt. 167; *Sawyer v. Childs*, 83 Vt. 329.

Judgment affirmed and cause remanded for the assessment of damages.

LASSITER v. RAILROAD COMPANY.⁷²*Supreme Court of North Carolina. 1904.**136 North Carolina, 89.*

CLARK, C. J.: The complaint is a sufficient statement of the facts constituting a cause of action (if the death had occurred in this State) for negligently causing the death of plaintiff's intestate by ordering him to go between cars not equipped with improved couplers to uncouple said cars, in obeying which order he was run over and killed. The defendant demurred on the ground that the complaint disclosed that "the intestate came to his death in the State of Virginia by reason of the alleged wrongful acts of the defendant, but does not allege that an action for wrongful death may be maintained in that State." Thereupon the plaintiff asked leave to amend the complaint by pleading the "statute law of Virginia, which gives a right of action for negligently causing death," which motion was refused on the ground that "the court had no power or discretion to allow the same, and but for such want of power the amendment would be allowed." The court further gave as a reason why it did not have such power to grant the motion: "1. Such an amendment would introduce a new cause of action and not enlarge or amplify the cause of action pleaded. 2. Such an amendment would deprive the defendant of the benefit of the statute of limitations embraced in the statute law of Virginia."

* * * * *

* * * Such allegation does not add to or change the "cause of action" which by the Code, sec. 233 (2), is a "statement of the facts." Those facts, the death and the wrongful negligence, are already fully stated. "In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action." *Railroad v. Babcock*, 154 U. S. 197. The failure to allege this foreign law is merely a defective statement of a good cause of action. But even if there were a failure

72. This is a "Code" case, but the decision is based wholly on common law considerations and is not controlled by any provision of the Code. The "complaint" is the Code equivalent of the common law "declaration."

to allege an essential fact to constitute the cause of action, the Code, sec. 273, expressly gives power to amend "by inserting other allegations material to the case." The rounding out of the complaint to cure a defective complaint, even in material matters, is not changing a cause of action nor adding a new cause, but merely making a good cause out of that which was a defective statement of a cause of action because of the omission of "material allegations" which the Code, sec. 273, authorizes to be inserted by amendment. If the cause of action were not defectively stated there would be no need of amendment.

The difference between a "defective statement of a good cause of action" which can be amended by inserting "other material allegations," as here, and a "statement of a defective cause of action" is that the latter cannot be made a good cause by adding other allegations. *Ladd v. Ladd*, 121 N. C. 121. We have a case exactly "on all fours" with this under the New York Code, sec. 723, which is the same as our Code, sec. 273. In that case, *Lustig v. Railroad*, 20 N. Y. Supp. 477, the administratrix brought suit in New York for the death of her intestate in New Jersey caused by the wrongful act of the defendant. After both sides had rested the defendant moved to dismiss "because there was no allegation in the complaint, nor proof on the trial of any statute in New Jersey authorizing a recovery of damages for death from wrongful injury, and that as no right of recovery existed at common law no cause of action had been made out." The trial court reopened the case and allowed the plaintiff to amend her complaint and to supply this defect in her evidence. This was sustained on appeal, the court holding that it was authorized by the New York Code, sec. 723 (which, in the words of our Code, sec. 273, allows an amendment "inserting allegations material to the case"), and that this "did not add a new cause of action" nor change the cause of action, but merely perfected a defective statement of a good cause of action, defective because of the omission of this averment. For the same reason the plea of the statute of limitations would not run, because the facts of the transaction being stated in the complaint the defendant had notice of the demand from the beginning of this action. The same power of amendment to insert the allegation of the foreign statute (which had been omitted in the complaint) was sustained and the same ruling that

the amendment related back to the beginning and the statute of limitation did not bar was made in *Railroad v. Nix*, 68 Ga. 572, in effect overruling a former Georgia decision which is the only one found in any court to the contrary. In *Tiffany* on "Death by Wrongful Act," sec. 202, it is said that "if the plaintiff's right of action arises under a foreign statute he should allege and prove it," but if the complaint "fails to allege the foreign statute, an amendment alleging it is not open to the objection that it sets up a new cause of action, although the period of limitation prescribed by the foreign statute has elapsed." * * *

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In holding that the court had no power to permit this there was error.⁷³

73. *Accord*: *Pratt v. Davis* (1895) 105 Mich. 499; *Huntingdon R. R. Co. v. Decker* (1877) 84 Pa. St. 419; *Georgia Co. v. Murden* (1889) 83 Ga. 753; *Bowden v. Burnham* (1894) 59 Fed. 752.

Contra: *Foster v. St. Luke's Hospital* (1901) 191 Ill. 94, where, in an action for wrongful death of a wife, the husband failed to allege in the declaration his relationship to the deceased and that she left a surviving husband or next of kin and that anyone suffered pecuniary loss by reason of her death. After the time fixed by the statute of limitations had expired plaintiff amended by adding these essential averments, and the statute was pleaded against the amended declaration. It was held that the action was barred.

MISCH v. McALPINE.

Supreme Court of Illinois. 1875.

78 Illinois, 507.

SCOTT, C. J., delivered the opinion of the court.

The declaration in this case was upon a promissory note, to which defendant, in the first place, filed the general issue, together with his own affidavit of merits as to his defense. At a subsequent term, and before the cause was called for trial, defendant entered a motion, in writing, for leave to plead specially, setting up fraud in obtaining the note, that it was given without consideration, and that plaintiffs, before they received it, had notice of such fraud and want of consideration.

The affidavits of defendant and Reed, made in support of the motion, showed clearly the necessity for additional pleas,

and that there had been no culpable negligence in not asking for leave at an earlier day to file them; but the court refused to allow the motion to plead further, except upon condition defendant would not ask for a continuance of the cause. Without abandoning his defense, defendant could not submit to the terms imposed and thereupon the court overruled the motion. A motion was subsequently made, based upon an affidavit, for a continuance of the cause, which the court overruled, and compelled the defendant to go to trial. Plaintiff recovered the amount of the note, and from that judgment defendant prosecutes this appeal.

Under the liberal provisions of the Practice Act in this State, we are of opinion the court ought to have permitted the defendant to file additional pleas, and that the refusal was error. Our present statute is much more comprehensive than the former one upon this subject. It allows amendments in civil cases at any time before final judgment, "either in form or substance, in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense." R. S. 1874, p. 778, sec. 24.

In this case, the affidavits in support of the motion show it was indispensable, to enable defendant to make a legal defense, that leave should have been given to file additional pleas. His alleged defense was not available under the former plea, and unless leave was given to present others his defense would be entirely cut off.

Such amendments, however, are to be "allowed upon such terms as are just and reasonable," within the discretion of the court. But such terms, in the language of the statute, must be "just and reasonable," and not so onerous as would practically amount to a deprivation of the right secured by the statute.

The conditions imposed by the court in the case at bar, under the circumstances, were unreasonable, and, in fact, amounted to a denial of an opportunity to make a "legal defense." Had defendant agreed to abide the terms suggested, it would have deprived him of testimony necessary to his defense, and the privilege to file his pleas would have been of no benefit to him. It appears, from the affidavit of defendant in support of the motion for a continuance, that he could not, with safety, have proceeded to trial at that

term of the court, on account of the absence of a witness, whose testimony was all-important to the defense proposed to be made. It is shown defendant had omitted no reasonable effort to procure the attendance of the witness but that he was absent from the State by the advice of a physician, on account of his health. The affidavit was full and complete, and made a clear case for a continuance of the cause.

* * *

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For the errors indicated, the judgment will be reversed, and the cause remanded, that defendant may have a new trial.

*Judgment reversed.*⁷⁴

74. As a condition precedent to the allowance of an amendment the court may require the party to submit to a new trial, or may allow the other party time to plead, or may impose the payment of costs, or may require the party to give security for costs. 31 Cyc. 378-381.

"It will not do for courts in the exercise of their judicial discretion to impose conditions upon litigants by way of punishment."—*Beecher v. Circuit Judges* (1888) 70 Mich. 369.

SECTION 2. AIDED BY VERDICT.

JACKSON v. PESKED.

Court of King's Bench. 1813.

1 Maule & Selwyn, 234.

Action upon the case. The declaration stated, that before and at the time of committing the grievances herein-after mentioned, a certain yard, and part of a certain wall, situate, etc., was in the possession and occupation of one William Frisk, as tenant to the plaintiff, the reversion thereof then and still being in the plaintiff, to wit, at, etc.; yet the defendant well knowing the premises, but intending to injure and aggrieve the plaintiff in his reversionary estate and interest of and in the said yard and the said part of the said wall, heretofore and whilst the said yard and the said part of the said wall were so in the possession and occupation of Frisk as tenant of the plaintiff, and whilst the plaintiff was so interested therein as aforesaid, to wit, on, etc., and on

divers other days and times between that day and the day of exhibiting this bill, at, etc., wrongfully, injuriously, and without leave and against the will of the plaintiff, erected, put, and placed upon the said part of the said wall divers large quantities of brick and mortar and other materials, and thereby raised the said part of the wall to a great height, to wit, the height of three feet more than the same had been before that time, and also put and placed divers pieces of wood and timber, and tiles upon the said wall overhanging the said yard, to wit, at, etc., by reason whereof, etc. After verdict for the plaintiff on the general issue, with 1s. damages, a motion was made in arrest of judgment against which Jervis and Comyn showed cause, and Lawes was heard in support of it, on a former day in this term.

Lord ELLENBOROUGH, C. J., on this day delivered the judgment of the court. This was an action by a reversioner for an injury done to a yard and part of a wall of which the reversion belonged to him, and the plaintiff obtained a verdict; but it not being alleged in the declaration that the acts done were to the damage of the plaintiff, as such reversioner, or that his reversionary estate and interest was thereby depreciated or lessened in value, the defendant obtained a rule *nisi* to arrest the judgment. The declaration contained only one count, and that count stated several acts which are ordinarily stated in declarations of trespass as mere injuries to the possession, viz., putting and placing upon part of a wall of the plaintiff quantities of brick and mortar, and thereby raising the same to a great height, and putting and placing pieces of timber, wood, and tiles upon the wall overhanging the said yard. The plaintiff also added, as consequential damage, "by reason whereof not only the said plaintiff during all the time aforesaid lost the use and advantage of his said part of the wall," (that is, sustained a temporary loss affecting the occupation and enjoyment thereof merely, which he had not, not being in possession) "but also by means of the said wood, timber, and tiles so overhanging the said wall, large quantities of rain and moisture have from time to time during all the said time run and flowed from the top of the said wall upon the yard of the plaintiff, and the said yard and the said part of the wall have been greatly injured and damnified." And the question seems to be whether, in the absence of any such allegation as is usually, and (I believe) invariably made in declarations of this sort,

that thereby the plaintiff's reversionary estate and interest in the premises were damaged or prejudiced, or lessened in value, we must infer that the water drip so described had a permanently injurious effect of this nature. It is not stated that the foundation of the wall was injured or undermined, or that the yard was more injured thereby as being wetted. The count does not import in terms that any act charged upon the defendant was injurious or to the damage of the plaintiff; the declaration does indeed contain the usual conclusion, "Wherefore the plaintiff saith he is injured and hath sustained damage, etc.;" but this is not matter of charge in the declaration, it is only the resulting inference of damage drawn by the plaintiff from the matter of charge; and unless the count, which is the matter of charge, warrants such inference, it has no effect; and in truth, although this part of the declaration was brought under our notice, but little stress was laid upon it as a special allegation of damage in the argument. The main point relied upon was this, that after verdict the court would infer that the plaintiff was confined at the trial to the proof of such an injury as would be prejudicial to the reversion, and that all the evidence short of this effect must be supposed to have been excluded; and it was with a view to look into this point that the court forebore giving its judgment at the time. Where a matter is so essentially necessary to be proved that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must in fair construction so far require to be restricted, that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict, that it was so restrained at the trial; but unless the allegation is of such a nature that it would have been doing violence to the terms as applied to the subject-matter, to have treated it as unrestrained, we are not aware of any authority which will warrant us in presuming that it was considered as restrained merely because in the extreme latitude of the terms such a sense might be affixed to them. The rule by which we must go, must be one applicable to all actions, in inferior as well as superior courts, to cases in which the judge has no power

to grant a new trial as well as to those in which there is such power; and to cases in which, if the jury do not think fit to follow the judge's direction, there is no power to correct their decision; and we must take care therefore not to extend the rule (if it has not been already extended further) beyond those cases in which we must presume the judge to have given a right direction, and the jury to have followed it. In *Barber v. Fox*, 2 Saund. 136, the heir of an obligor was sued upon a promise in consideration of forbearance. He pleaded non assumpsit, and there was a verdict against him. It was then moved in arrest of judgment, because it was not alleged that the bond in this case bound the obligor's heirs. It was answered, that the verdict had cured the objection; for if the heir was not bound, the jury should have found for the defendant; and it ought therefore of necessity to be intended that the obligor bound his heirs; but the court held they could not make the intendment; and the judgment was arrested. *Hunt v. Swaine*, 1 Lev. 165, and Sir T. Raym. 127, are to the same point. In *Buxendin v. Sharp*, Salk. 662, in an action for keeping a mischievous bull, there was no scienter in the declaration; and after verdict for the plaintiff, the judgment was arrested on that account; and the Court said they "could not intend it was proved at the trial, for the plaintiff need not prove more than is in his declaration;" and yet every lawyer is aware that a knowledge of the mischievous nature of the animal is of the essence of such an action, and would therefore never suffer a jury, if he could control them, to find for the plaintiff in such a case, unless such a knowledge in the defendant were proved. In *Nerot v. Wallace*, 3 Term Rep. 25, BULLER, J., says, "After verdict everything shall be intended which the allegations of the record required to be proved;" but do the allegations of the record in this case properly require an injury to the reversion to be proved, or will they not be more justly and naturally satisfied by an injury to the possession only? The case most favourable for the plaintiff which I have been able to meet with, is *Jenkins v. Turner*, Ld. Raym. 109, where, upon a declaration for keeping a boar accustomed to bite, which had bitten a mare of the plaintiff; the allegation was that he was accustomed to bite "animals," and it was urged, upon a motion in arrest of judgment, founded upon the generality of this word, that animals might be frogs or such animals; to which

POWELL, J., answered, that the judge of assize knew well that this would not be actionable unless the boar had been used to bite horses, sheep, etc., and not frogs; and consequently if that had not been proved, he would not have suffered the jury to have given a verdict for the plaintiff; and therefore they would intend that the evidence was of biting such animal as would support the action. It may be observed, however, upon this case, that it would have been a forced and unnatural construction to have applied the word animals to frogs or such animals, and that the sense in which the court understood the term is the sense in which alone a judge and jury would naturally understand it. And POWELL, J., said it might have been a question in the case of keeping a dog, whether *ad mordend. animalia consuet.* had been good because then it might have been intended more generally of animals *ferae naturae*, which it is the nature of a dog to kill. As, therefore, there is no authority, upon which we can say we are warranted in presuming that the jury were confined to such injuries as would necessarily prejudice the reversion; as the charge in the declaration is conceived in such terms as to include injuries which are not necessarily prejudicial to it, but more aptly and naturally applied to injuries to the possession only; and as the plaintiff has not charged that the reversion was prejudiced, or that the plaintiff was damnified in respect thereof, we are not warranted in inferring that such a prejudice out of the natural and ordinary scope of the allegation must have been proved; and therefore the rule for arresting the judgment must be made absolute.

MCCUNE v. NORWICH CITY GAS COMPANY.

Supreme Court of Errors of Connecticut. 1862.

30 Connecticut, 521.

SANFORD, J.: This is a motion in arrest for the insufficiency of the declaration. There are two counts, but in all their material allegations they are substantially alike, and the same questions arise on both of them.

The plaintiff alleges that the defendants were a corporation, created for the purpose, and engaged in the business,

of making, distributing and selling illuminating gas, and that they had laid down their main pipes in the streets and lanes of the city for the conveyance of gas to their customers; that the plaintiff's rooms had been fitted up with gas pipes, and fixtures, connected with the defendants' main pipes, and that for some time immediately prior to the 15th November, 1858, the defendants had by means of said pipes supplied the plaintiff with gas for lighting said rooms for a certain reasonable compensation paid therefor, and that the plaintiff desired to continue to light his said rooms with gas as aforesaid, and was ready and willing to pay to the defendants a reasonable compensation for the same, and to abide by all the reasonable rules and regulations of said company, and requested the defendants to continue to supply said rooms with gas; and that it then became and was the duty of the defendants to continue to supply the plaintiff with gas for the purpose aforesaid on the conditions aforesaid; yet that the defendants, not regarding their said duty, but contriving and intending to vex and annoy the plaintiff in the use and enjoyment of his said premises, maliciously, wantonly, and without any justifiable cause, and contrary to the mind and will of the plaintiff, refused to supply the plaintiff with gas, and shut off the same from entering the gas pipes of said rooms, etc.; by reason whereof the plaintiff has been deprived of the means of lighting said rooms with gas, and of the use and enjoyment of said gas fixtures, and has been put to great expense in providing other means of lighting said rooms, etc."

No contract for the supply of gas for any definite period is alleged to have been made by the defendants, nor indeed any contract at all. The entire foundation of the plaintiff's claim, as it is set out in this declaration, rests upon the supposed legal duty or obligation, independent of any contract, to continue the supply. But no facts are stated from which such duty or obligation arises, and the allegation of a duty or liability is of no avail, and will not help a declaration, unless the facts necessary to raise it are stated. It is but the statement of a legal inference, never traversable, and of no avail in pleading. *Bailey v. Bussing*, 29 Conn. 1; and the authorities there cited; *Hayden v. Smithville Manufacturing Co.*, id. 548.

Had the defendants agreed to furnish the plaintiff with gas for any specified time, or until they should give notice

of their intention to discontinue the supply, they would undoubtedly have been liable in damages for the nonperformance of such contract, but the contract itself must have been set up in the declaration and the action must have been founded upon it. And perhaps, too, had the plaintiff declared upon a contract by the defendants to supply him with gas until they should give him reasonable notice of their intention to discontinue such supply, the jury might have found such contract and its violation, upon proof of the facts and circumstances detailed in this declaration. But no such case is now before us, and we know of no principle upon which we could stand in holding the defendants liable upon the facts set up in this declaration.

The manufacture and sale of gas is a business which may be prosecuted or discontinued at the will of the party engaged in it. The relations between the maker and the consumer originate in the contract between them, and their respective rights and obligations are controlled entirely by the stipulations of such contract, and as (where no contract prohibits) the one may refuse to take the article at his pleasure, so may the other at his pleasure refuse to supply it. We discover no reason for subjecting the maker of gas to duties or liabilities beyond those to which the manufacturers and venders of other commodities are subjected by the rules of law.

The articles of association under which the defendants are organized and exist as a corporate body, confer upon them no peculiar powers, and impose no peculiar duties or obligations, affecting the question now before us.

The allegation that the defendants cut off the supply of gas maliciously and wantonly, and with intent to injure the plaintiff, is of no importance in the determination of this question. Where a party has a legal right to do a particular act at pleasure, the motive which induced the doing of the act at the time in question can never affect his legal liability for the act, whatever effect such motive may have upon the quantum of damages, when his liability is fixed.

It was claimed upon the argument that the declaration, though it might have been demurrable, was cured by the verdict, because, it was said, that from the allegation that the defendants had connected their main with the plaintiff's pipes and burners and were, up to a specified time, supplying the plaintiff with gas, some agreement between

the parties must be implied, and the terms of it must have been proved upon the trial, or the jury could not have found their verdict for the plaintiff. But upon this motion the question is not whether an agreement in fact existed or was proved, but whether it is set up in the declaration as the foundation of the plaintiff's right of recovery. The verdict establishes the truth of all the material allegations of fact which the declaration contains, because it must now be presumed that they were, as they might have been, proved upon the trial; but no evidence was admissible to prove facts not stated, and therefore it cannot be presumed that such facts were proved, or passed upon by the jury. The plaintiff can prove and recover upon only the allegations in his declaration. It is true that when a fact not specifically stated in the declaration is so inseparably connected with one which is, that the latter cannot be proved at all without proving the former, then a general verdict for the plaintiff demonstrates the existence of both of them, because both are necessarily involved in one and the same issue. So, too, if a material fact is stated in such general and indefinite terms that, if demurred to, the pleading would be adjudged bad for want of sufficient certainty, yet if, instead of demurring, the other party takes issue upon it, and the verdict is against him, the defect is cured, because the fact stated could not have been proved at all without proving at the same time those concomitant circumstances attending it, for the omission of which the pleading was demurrable. Thus, if a tender is pleaded without time or place, the plea is bad on demurrer, for the opposite party has a right to be informed by the plea when and where the tender is claimed to have been made, in order that he may prepare to meet the claim. But if, instead of demurring, he takes issue upon the plea and the verdict is against him, the plea is cured; because the tender could not have been proved at all without proving when and where it was made. But in a special count upon a simple contract, if the defendant's promise only is alleged, and there is no allegation of any consideration for such promise, no verdict would aid the omission, because the promise and the consideration for it have no necessary or natural connection, and the one may be proved without giving any evidence of the other. And yet in the case last supposed it would be the duty of the jury to give their verdict for the plaintiff, al-

though a judgment for him thereon would be erroneous; the province of the jury being to decide whether the material allegations in the declaration are true or false, and to render their verdict accordingly.

The verdict of the jury in favor of the pleader, therefore, establishes the truth of all those material allegations of fact which the pleader makes, and nothing more. And when a fact material to the plaintiff's right of recovery is omitted from his declaration altogether, and is not so connected with other facts which are stated that the latter cannot be proved without proving the former, the verdict of the jury of course ascertains nothing in regard to such omitted fact, and cannot aid the declaration.

This seems to be the logical as well as legal corollary from the settled propositions, that no evidence is admissible to prove any fact not stated in the pleadings and involved in the issue, and that the court will never presume that illegal evidence was received upon the trial. Stephen's Pl. 167, *et seq.*; Gould's Pl. 496, *et seq.*

In the case at bar the title or right of recovery set up by the plaintiff in his declaration, is the supposed duty or obligation imposed upon the defendants by law to supply the plaintiff with gas, and the facts out of which that duty is claimed to have arisen are, that the gas pipes of the plaintiff and the defendants were united, that up to a specified time the defendants had supplied the plaintiff with gas by means of such pipes and had been paid for it, and that the plaintiff desired to continue to take the defendants' gas, and was ready and willing to pay for it as he had done before, which, as we have already said, is the statement of no title at all, for on these facts the law raises no such duty or obligation as the plaintiff claims.

We think the motion in arrest ought to prevail, and we advise accordingly.

CANNON v. PHILLIPS.

*Supreme Court of Tennessee. 1854.**2 Sneed, 185.*

TOTTEN, J. delivered the opinion of the court.

Phillips sued Cannon, in the circuit court of Bedford, in an action on the case for oral slander. Defence is made, first, by demurrer to the declaration, and that is overruled. The defendant, by leave, then pleaded not guilty, and the trial resulted in a verdict and judgment for the plaintiff for \$3,000. The defendant appealed in error.

* * * * *

It is argued that the defect in the declaration is cured by the verdict.

On this subject the rule is that where there is a defect or omission in the declaration, that must be fatal on general demurrer, yet if the issue joined be such as required the facts defectively stated or omitted to be proved on the trial, the defect or omission is cured by the verdict. For the law will presume that the facts were proved, otherwise the verdict would not have been for the plaintiff. *Pangburn v. Ramsey*, 11 Johns. 142; *Chapman v. Smith*, 13 id. 80.

But in the present case there was no waiver of the defect in the declaration. The objection was taken at the threshold by demurrer. The declaration was not amended; the demurrer was erroneously overruled, and the defendant compelled to plead and go to trial on a declaration which contained no cause of action.

In such case the whole proceeding is erroneous, and the declaration is not cured by the verdict.

Let the judgment be reversed.

SECTION 3. REPLEADER.

EX PARTE PIERCE.

Supreme Court of Alabama. 1885.

80 Alabama, 195.

CLOPTON, J.: In an action, brought by M. P. Levy & Co. against the petitioner in the circuit court for Calhoun county, the defendant pleaded the general issue and three special pleas. Each of the special pleas contained a confession of a cause of action, and alleged in avoidance immaterial and insufficient matter. There was a verdict for the defendant, which was set aside, and a repleader awarded. This is an application for a mandamus to have judgment entered on the verdict, and the case stricken from the docket. When a plea contains a confession of a cause of action, and avoids it by presenting an immaterial issue, and there is a verdict for the defendant, the plaintiff is entitled to judgment *non obstante veredicto*; but if the plea does not confess a cause of action, a repleader may be granted. *Lambert v. Taylor*, 4 B. & C. 138; 1 Chitty Pl. 688. Such is the rule at common law, and was of easy application so long as the parties were restricted to a single issue; but since, by statute, the defendant is allowed to plead as many distinct pleas as he may be advised, though inconsistent with each other, thus presenting several issues of fact, a serious difficulty arises as to the application of the rule, when some of the issues are material and others immaterial, and there is a general verdict for the defendant.

In *Wallace v. Barlow*, 3 Bibb. 168, issues were joined on three pleas, two of them being immaterial. It was held, that a material issue having been joined, and a general verdict for the defendant, it should not be set aside and a repleader granted; and that whenever the court can give judgment upon the whole record a repleader should not be awarded; but the finding as to these issues, which could not affect the merits, should be disregarded, and judgment entered on the finding as to the good issue. In *Cullum v. Branch Bank*, 4 Ala. 21, the right of the defendant to have the jury instructed to find a verdict on any issue sustained

by his proof is conceded without question, because in such event, the plaintiff could evade the consequence of the verdict founded on an immaterial issue by a motion to enter a judgment *non obstante veredicto*. It is said: "The defendant did not pursue this course, but asked a charge which, if given, would have led to a general verdict, and the plaintiff would, in that case, have been remediless, as under the issue of non assumpsit, the reason on which the verdict was founded could not have been ascertained."

In *Mudge v. Treat*, 57 Ala. 1, the rule is thus stated: "A replender should not be awarded, because of the immateriality of one of the issues, after a general verdict on all, some being sufficient, unless it affirmatively appears the verdict was on the immaterial issue only." The logical sequence from these decisions is, that whenever enough exists in the record, not being impertinent or uncertain, on which judgment may be given, the reason for awarding a replender, when all the issues are on immaterial points, does not apply; and that the statute, allowing several pleas, operates to abrogate the rule, when there is a general verdict on both material and immaterial issues, except in case the entire record affirmatively shows, that the finding was on an immaterial point only.

* * * * *

The record, as presented, does not disclose what instructions, if any, were given by the court as to the insufficient pleas. The verdict of the jury is set out *in haec verba*: "We the jury find the issues in favor of the defendant." Its terms are responsive to, and comprehensive enough to embrace all the issues, material and immaterial, submitted to the jury. The fair and reasonable interpretation of the verdict is, that the jury found all the issues in favor of the defendant. *Tippin v. Petty*, 7 Por. 441. On such a verdict, it cannot be said, that it is founded on any particular issue only, whatever may be our opinion of the state and character of the proof. If such be the fact, no means are furnished to ascertain on what particular issue. The general issue is a denial of the cause of action as set forth by the plaintiffs, and devolved on them the onus of proving it. The juries are the exclusive judges of the credibility of witnesses, and the sufficiency of evidence. If their finding is contrary to the evidence, resort for the correction of the error must be by a motion for a new trial. It

may operate a hardship on the plaintiffs; but violence would be done to the finding of the jury as expressed in the terms of their verdict, were it restricted to the immaterial issues only, by inferences only from the insufficiency of the evidence to support the verdict on the material issue. On the record, a case for a repleader was not presented, and the defendant was not entitled to have judgment entered on the verdict. Otherwise, the effect would be to grant a new trial under the guise of awarding a repleader.

The remaining question is, will mandamus lie to compel the circuit court to enter judgment? It is an established principle, that a mandamus will issue to an inferior court to compel the rendition of a judgment, where such court, having heard and tried the case, refuses to render judgment; but relief will not be granted by mandamus, when there is another adequate legal remedy, as when the interlocutory order complained of may be revised and corrected on appeal from the final judgment. *Ex parte S. & N. Ala. R. R. Co.*, 65 Ala. 599. Whether or not a repleader shall be awarded is not a matter in the discretion of the court, and the action of the court relating thereto is revisable. Awarding a repleader is not the same as granting a new trial. They are distinct in their nature and purposes, and constitute different modes of proceeding. *Chapman v. Holding*, 60 Ala. 522. The one is discretionary, not subject to revision. The other does not rest in the discretion of the court, and must be granted or refused on established common-law principles; and if error intervenes, it may be corrected by the appellate court. The plaintiff having made a motion for a new trial, which was withdrawn, and afterwards made a motion to set the verdict and for a repleader, elected their remedy, and must submit to its burdens and disadvantages. If a repleader be improperly refused, the plaintiff may appeal from the judgment entered on the verdict, and have the refusal revised. *Mudge v. Treat, supra*. Hence in such case, a mandamus will not lie. But if a repleader be improperly awarded, no judgment is entered from which an appeal can be taken. Though the defendant may object, if he subsequently appears, engages in another trial, examines witnesses, and litigates, he waives his objection to the award of the repleader, and is precluded to deny that the case is properly pending in court. *Byrd v. McDaniel*, 20 Ala. 582; *Hair v. Moody*, 9

Ala. 399. An appeal from the final judgment would not be an adequate remedy. *Lloyd v. Brinck*, 35 Tex. 1; *Fish v. Neatherwood*, 2 Johns Cas. 215.

In my opinion the mandamus should be granted. But the majority of the court do not concur in this conclusion.

PER CURIAM. The result of the trial and verdict in this case was a manifest injustice to plaintiffs. The defenses set up were without merit, and the court would have been justified in setting the verdict aside *ex mero motu*, and allowing the pleadings to be amended. We will not say it was not the duty of the court not to do so. One of the chief purposes for which courts are organized is, that while observing the dividing line which separates the duties of the judge from those of the jury, the presiding judge should exert his powers in favor of legal justice. The effect of the order made was precisely the same as the granting of a new trial, with leave to amend the pleadings. Justice was done, and the law regards substance rather than forms, or the name of things. Judgments, correct in substance, should never be reversed because bad reasons are given for them, nor because they are designated by erroneous names.

The majority of the court hold that the mandamus must be denied.

CHAPTER XL

PARTIES TO ACTIONS.

SECTION 1. GENERAL PRINCIPLES.

WESTERN AND ATLANTIC RAILROAD COMPANY v. DALTON MARBLE WORKS.

Supreme Court of Georgia. 1905.

122 Georgia, 774.

SIMMONS, C. J.: A summons was issued by a justice of the peace in the name of the "Dalton Marble Works" against the Western and Atlantic Railroad Company. At the trial before the justice a motion was made to dismiss the case on the ground that it was not alleged that the "Dalton Marble Works was a corporation, nor, if it was a partnership, did it appear who were the partners composing the firm, nor was it the name of an individual." To meet this objection plaintiff's counsel amended by inserting, after "Dalton Marble Works," the words "H. P. Colvard, proprietor," to which amendment the defendant objected. The magistrate rendered judgment against the railroad company, and it appealed the case to a jury, where the same motion to dismiss and objection to the amendment were made. The jury returned a verdict against the railroad company, and it sued out a certiorari to the superior court, alleging various errors committed on the trial, among them being those above stated. The certiorari was refused, and the railroad company excepted.

1, 2. The view we take of the case renders it unnecessary to discuss any of the questions made in the bill of exceptions, except the validity of the suit commenced in the justice's court. We think the court erred in not sustaining the certiorari upon this ground. As was said in the case of *Anderson v. Brumby*, 115 Ga. 649, "This court is fully committed to the proposition that no suit can be lawfully prosecuted save in the name of a plaintiff having a legal entity,

either as a natural or as an artificial person." In every suit brought in this State there must be a real plaintiff and a real defendant. The plaintiff or the defendant may be a natural or an artificial person, or a *quasi* artificial person, such as a partnership. If the suit is brought in a name which is neither that of a natural person, a corporation, nor a partnership, it is a mere nullity. A natural person may bring a suit in his name for himself, or for the use of any other person when he holds the legal title and such other person the equitable title. A corporation may bring suit in its own name, and, if it fails fully to describe its legal entity, may amend by alleging that it is a corporation. A partnership may do likewise.⁷⁵ And this is the distinction between this case and those of *St. Cecilia's Academy v. Hardin*, 78 Ga. 39; *Smith v. Columbia Jewelry Co.*, 114 Ga. 698; *Adas-Yeshurun Society v. Fish*, 117 Ga. 345; and *Perkins v. Shewmake*, 119 Ga. 617, relied on by defendant in error. In these cases the legal entity of the partnerships or corporations was not fully disclosed, and this court held that the petition might be amended by alleging that the party was a partnership or corporation, as the case might be, the names importing partnerships or corporations; and if the cases had gone to judgment without any objection to the names the judgments would have been good, because each of the names imported a corporation or partnership. The name "Dalton Marble Works" cannot be fairly said to import a corporation or a partnership, without further description of its legal entity. Even if it is probable that the court might have construed this name as one that imports a corporation or a partnership, the amendment offered and allowed by the court negatives such a construction, for the reason that the amendment, which was simply "Dalton Marble Works, H. P. Colvard, proprietor," clearly shows, if it be true, that the "Dalton Marble Works" was neither a partnership nor a corporation, but merely the name of Colvard's property. The "Dalton Marble Works," then, being neither a natural person, a corporation, nor a partnership, could not legally institute an action; or, in other words, there was no plaintiff to the action, and, there being

75. A partnership is not to be deemed a legal entity in the absence of a statute so declaring. It is a mere group of individuals acting jointly and should sue and be sued as such. See *Wright v. Williamson*, given in the text *infra*, and notes.

none, the suit was a mere nullity, and could not be amended by inserting the name of Colvard as proprietor, there being nothing to amend by. See, on this subject, *Barbour v. Albany Lodge*, 73 Ga. 474; *Thurman v. Cedar Spring Church*, 110 Ga. 816; *Mutual Life Co. v. Inman Park Church*, 111 Ga. 678; *Anderson v. Brumby*, 115 Ga. 649; *Wynn v. Richard Allen Lodge*, 115 Ga. 796; 15 Enc. Pl. & Pr. 476, and notes.

Judgment reversed. All the justices concur, except CANDLER, J., absent.

McLEAN COUNTY COAL COMPANY v. LONG.

Supreme Court of Illinois. 1879.

91 Illinois, 617.

WALKER, J., delivered the opinion of the court.

It appears that John Long, the husband of appellee, in his lifetime sued appellant to recover for a quantity of coal it had mined, removed from land belonging to him, and converted to its own use. He recovered a judgment, and appellant brought the case to this court, and the judgment was reversed and the cause remanded. (See 81 Ill. 359.) After the judgment was reversed, and before the case was redocketed in the court below, Long died, having, by will, devised and bequeathed all of his property to appellee. The cause was docketed, the death of Long suggested, and leave given to amend the declaration, which was done by making appellee plaintiff, and the cause progressed in her name to a trial and judgment against the company, a motion for a new trial and in arrest having been overruled, and the company again appeals.

On the trial appellant objected to the admission of evidence of the mining and conversion of the coal.

It appears that neither appellee nor any other person ever became executor or administrator of Long's estate, no steps being taken in the probate court for the purpose. On the one side it is urged that appellee could not maintain the action, or anyone else, until letters should be granted on Long's estate. But it is claimed, as all of Long's prop-

erty was willed to appellee, she thereby became vested with the legal title to the claim, and may recover.

* * * * *

At common law it was an inflexible rule, with few exceptions, that a chose in action could not be assigned or transferred so as to give the assignee a right of action in his own name. That could not be done verbally or in writing, neither by deed, will or simple contract. Even promissory notes could not be so assigned or transferred until authorized by the Statute of Anne. Bills of exchange were not an exception, under the common law, as they were governed by the mercantile law. Leases, and some covenants for title, ran with the land, and were assigned and transferred by a conveyance of the land to which they related. An effort to thus transfer causes of action and contracts no doubt passed to the assignee an equitable title, which the courts of law came to recognize and protect, as such, by requiring the assignor, on being indemnified, to permit suit to be prosecuted in his name, that his assignee might have the benefit of the equitable transfer of the claim.

Had Long in his lifetime sold this claim, would anyone contend that the purchaser could have maintained an action in his own name? Or, suppose he had bequeathed this claim to some one else, and willed the remainder of his property to appellee, would anyone suppose that the legatee could sue and recover in his name? Had Long bequeathed to appellee notes or contracts, does anyone suppose she would thereby derive authority to sue? The will does not vest the legal title to a cause of action in the legatee, any more than would his assignment of such claim in his lifetime. The appointment of an executor to carry out the provisions of the will, vests the title to the goods, chattels and choses in action in the executor, as a *quasi* trustee, for the use of the creditors, distributees and legatees. He can maintain trover, replevin, or other appropriate action for the recovery of the personal property, or to recover damages for its wrongful injury or destruction. The legatee cannot maintain such actions, and the same is true of choses in action.

These are elementary rules that need no discussion.

* * * * *

* * * Here, appellee has only an equitable title, and that never confers the right to sue at law. * * *

We are, therefore, of opinion that appellee had no right, without obtaining letters on the estate, to maintain the action.

It is urged that appellant should have pleaded in abatement. We fail to see that the law required such a plea to interpose the defence. To recover, she was bound to prove a legal right vested in her. She could not recover by proving a right in another person. A person cannot recover by claiming a demand, and showing another person holds the demand claimed; and such is the proof here. This defence may be made under the general issue, as that put her on the proof of her claim. * * *

* * * * *

The court below, therefore, erred in not arresting the judgment, and for that error the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

WELCH v. MANDEVILLE.

Supreme Court of the United States. 1816.

1 Wheaton, 233.

[This was an action of covenant brought in the name of Welch for the use of Prior against Mandeville and Jamieson. Mandeville pleaded in his second plea that a former suit had been instituted on the same demand, and that it had been dismissed upon Welch's acknowledgment in court that he would not farther prosecute it. To this plea plaintiff filed a special replication alleging that Welch was indebted to Prior in more than the sum of \$8707.09 and the defendants were indebted to Welch in said sum of \$8707.09 upon the covenant mentioned in the declaration, and that Welch assigned the covenant to Prior in discharge of said debt, of which assignment the defendants had notice. The replication further alleged that the suit in the plea mentioned was brought in the name of Welch, as the nominal plaintiff, for the use and benefit of Prior, and that the said suit was dismissed without the authority consent or knowledge of Prior, by the fraudulent collusion of Mande-

ville and Welch, for the purpose of defrauding Prior. To this replication a general demurrer was filed.]⁷⁶

STORY, J., delivered the opinion of the court.

The question upon these pleadings comes to this, whether a nominal plaintiff, suing for the benefit of his assignee, can, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action.

Courts of law, following in this respect the rules of equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection, not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law. They will not, therefore, give effect to a release procured by the defendant under a covenous combination with the assignor, in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment. The dismissal of the former suit, stated in the pleadings in the present case, was certainly not a retraxit; and if it had been, it would not have availed the parties, since it was procured by fraud. Admitting a dismissal of a suit by agreement to be a good bar to a subsequent suit (on which we give no opinion) it can be so only when it is bona fide, and not for the purpose of defeating the rights of third persons. It would be strange, indeed, if parties could be allowed, under the protection of its forms, to defeat the whole objects and purposes of the law itself.

It is the unanimous opinion of the court, that the judgment of the circuit court, overruling the replication to the second plea of the defendant, is erroneous, and the same is reversed, and the cause remanded for further proceeding.

*Judgment reversed.*⁷⁷

76. Condensed statement of facts by the editor.

77. *Record need not disclose real plaintiff.*

"It is well settled that in suits at law, a person who is interested merely as usee, is not regarded as a party to the suit, and the fact that the suit is brought for his use need not be expressed upon the record. *American Express Company v. Haggard*, 37 Ill. 465. It follows that the insertion of the name of the usee may be regarded as surplusage, at least on demurrer." *Northrop v. McGee* (1886) 20 Ill. App. 108.

"It is usual, when an action is brought in the name of one person for the use of another, to state the fact in the body of the declaration, or by an endorsement thereon or on the writ. And it is useful and convenient to do so, to give notice to the defendant of the rights of the substantial plaintiff,

and to enable the court to protect them by its orders. But this is not necessary. The statement is no material part of the pleading." *Clarksons v. Doddridge* (1857) 14 Gratt. (Va.) 42.

Consent of nominal plaintiff. It is neither necessary that the consent of the legal plaintiff to the use of his name be obtained, nor will an objection to such use be effective to prevent it; the only privilege enjoyed by the record plaintiff is the right to demand security for costs: *Fay v. Guynon* (1881) 131 Mass. 31; *Sumner v. Sleeth* (1877) 87 Ill. 500; *Hargraves v. Lewis* (1849) 6 Ga. 207; *Eckford v. Hogan* (1870) 44 Miss. 398; *Webb v. Steele* (1842) 13 N. H. 230; *Guernsey v. Burns* (1841) 25 Wend. (N. Y.) 411.

Real plaintiff protected against nominal plaintiff. In *Dazey v. Mills* (1848) 10 Ill. 67, after conceding that there were cases holding that admissions of the nominal plaintiff could be given in evidence to defeat the real plaintiff, the court said: "On the other hand, it is held in the cases of *Frear v. Evertson*, 20 Johns. 142; *Hackett v. Martin*, 8 Greenl. 77, and *Chisholm v. Newton*, 1 Ala. 371, that the declarations of the nominal plaintiff, made after he has parted with his interest in the cause of action, are not admissible in evidence to defeat the claim of the real party in interest. The assignee of a chose in action will be protected in a court of law against the acts and declarations of the assignor subsequent to the assignment. *Kimball v. Huntington*, 10 Wend. 677. Where a chose in action is assigned by the owner, he cannot interfere to defeat the rights of the assignee in the prosecution of a suit brought to enforce those rights, and it makes no difference whether the assignment be good at law or in equity only. *Mandeville v. Welch*, 5 Wheat. 277. A payment made to the nominal plaintiff after the defendant has notice of the assignment constitutes no defense. *Littlefield v. Storey*, 3 Johns. 426. So of a set-off obtained after notice of the assignment. *Anderson v. Van Allen*, 12 Johns. 343. So of a release procured from the nominal plaintiff after notice of the assignment. *Andrews v. Beecker*, 1 Johns. Cas. 411; *Raymond v. Squires*, 11 Johns. 47. And it is immaterial whether the assignment be of the whole subject-matter, or as collateral security. *Wheeler v. Wheeler*, 9 Cowen, 34.

"It seems to be the tendency of modern decisions, to recognize the rights of the beneficial party, and to protect him against the acts of the party possessing the naked legal interest, whenever it can be done without injuriously affecting the rights of the debtor; and subject to this qualification we are inclined to adopt the rule in its fullest extent. The assignee is allowed to sue in the name of the person having the legal interest, and to control the proceedings. The latter cannot interfere further with the prosecution than to require indemnity against the payment of costs."

HAYWARD v. GIFFARD.

Court of Exchequer. 1838.

4 Meeson and Welsby, 194.

Jervis had obtained a rule calling upon one George Spencer to show cause why he should not pay forthwith to the defendant, Francis Giffard, the sum of 112 l. 14 s. 3d., the amount of the taxed costs on the judgment as in the case of a nonsuit in the above cause, and also the costs of the application. The action was brought against the defendant Giffard, as clerk to the trustees of Tothill Fields,

acting under an act of Parliament for paving, lighting and improving the district called Tothill Fields; and the other defendant, Edward Grove, was and acted as a constable or broker for the trustees in making a distress upon a house in the district, occupied by the plaintiff as tenant to the said George Spencer. The affidavits upon which the rule was obtained stated a variety of facts, for the purposes of showing that Spencer was the real plaintiff, and not Hayward; and they set forth an admission by the plaintiff's attorney, whereby he agreed to admit on the trial of the cause "that the action was brought by and at the expense of the said George Spencer, and that the said John Hayward was the nominal plaintiff only." The cause, however, did not proceed to trial, but judgment as in case of a nonsuit was signed, and the defendant's costs were taxed at the above mentioned sum of 112 *l.* 14 *s.* 3*d.*

Rogers showed cause. This application, calling upon a person who is not a party to the record to pay the costs of an action after judgment has been signed, is altogether without precedent, and no case of a similar application can be found. Many cases may be found where, in the early stages of a cause, a plaintiff has been compelled to give security for costs; but even in those cases the courts require the application to be made in the first instance, so as not to allow the party to incur costs. And the reason for such practice is, that thereby the party is prevented from going on and increasing the amount of costs until he has given security for them, which may induce him to consider whether he has any good grounds for proceeding in the action. Here the party ought to have come to the court immediately after the admission was made, and not have waited until after judgment was signed. He cited *Adams v. Brown*, 9 Bing. 81, 2 M. & Scott, 154, and *Berkeley v. Dimery*, 10 B. & Cr. 113.

Jervis and Turner, contra. In this case, Spencer, the real plaintiff, is seeking, in the name of Hayward, to try a right affecting his property, and ought therefore to be compelled to pay the costs of the action. In cases of ejectment it is frequently done; and in *Doe d. Martin v. Gray*, 10 B. & Cr. 615, the court, in an action of ejectment, compelled the real defendant, although he was not the party on the record, to pay the costs.

PARKE, B.—These cases proceed on a different ground: that as the landlord was the real defendant, he ought to

have entered into the landlord's rule. The defendant should have come to the court for security for costs.] This is in truth the same as an ejectment, for it is an action to try a right affecting the property of the landlord. There can be no doubt here that Spencer is the real plaintiff; the attorney in the cause admitted that he is, and he himself has not ventured to deny it. [Lord ABINGER, C. B.—What jurisdiction have we over persons who are not parties to the record? We have over attorneys and officers of the court; but in a case where persons are not parties to the record, and have committed no contempt, how could we enforce our order?] It may be enforced by attachment for disobedience to a rule of court. * * *

Lord ABINGER, C. B.—If we were at liberty to consult equity and justice, we should probably make this rule absolute. But the authority of the courts at Westminster is derived from the Queen's writ, directing them to take cognizance of the suits mentioned in the writs respectively, and thus bringing the parties before them. This being so, they have no power to order any particular individual to come before them at their pleasure. In the present case, if it could have been shown that Spencer had committed any contempt of court, or been guilty, in respect of this suit, of anything in the nature of barratry or maintenance, it would have been another matter; but we cannot make any order against an individual who is not party to any suit before us, nor has been guilty of any contempt, but merely because he has an interest in the event of the suit. However anxious, therefore, we might be to make this rule absolute, by doing so we should establish a precedent which might open a wide sea to injustice. The cases where the courts have interfered in this way are cases of exception. They are cases where application is made for security for costs, and even there the order is made in the cause, and the immediate thing commanded is a stay of proceedings, by which means the ulterior object of a security for costs is obtained. So in ejectment, which is a fictitious proceeding, the courts allow the action to be brought in the name of a nominal plaintiff, and allow the landlord to come in and defend, but they take notice of the real parties litigant. Those are the excepted cases, but the general rule is, that

courts of justice have no power to except over parties to the record.

PARKE, B., concurred.

*Rule discharged, without costs.*⁷⁸

78. *New parties*, either plaintiff or defendant, cannot be added by amendment of the pleadings, in the absence of statutory authorization: *Choteau v. Hewitt* (1846) 10 Mo. 131; *Chamberlin v. Hite* (1836) 5 Watts (Pa.) 373; *Wilson v. Wallace* (1822) 8 S. & R. (Pa.) 53; *Elliott v. Clark* (1846) 18 N. H. 421; *Ayer v. Gleason* (1872) 60 Me. 207; *Noll v. Swineford* (1847) 6 Pa. St. 187; *Seitz v. Buffum* (1850) 14 Pa. St. 70; *Commission Co. v. Russ* (1828) 8 Cow. (N. Y.) 122; except by express consent, *Winslow v. Merrill* (1834) 11 Ma. 127.

PEARSON v. NESBIT.

Supreme Court of North Carolina. 1827.

1 Devereux Law, 315.

[Richmond Pearson, at the time of his death, was indebted to A. Nesbit & Co., which firm consisted of the defendant Nesbit and Jesse A. Pearson. He appointed the plaintiff, Elizabeth Pearson, and Jesse A. Pearson executor and executrix of his will. Nesbit & Co. sued these personal representatives on the said claim, and they confessed judgment, which remained unsatisfied. Later Elizabeth Pearson moved in the alternative for a writ of error or for an order setting aside the judgment, on the ground that Jesse A. Pearson was both plaintiff and defendant in the original action.]⁷⁹

HENDERSON, J.: A suit at law, is a contest between two parties in a court of justice; the one seeking, and the other withholding the thing in contest. The same individual cannot be, at the same time, both the person seeking and the person withholding. For it involves an absurdity, that a person should seek from himself, or withhold from himself. Between a corporation and individuals composing it, this identity does not exist, and the absurdity above stated is avoided; but where the same person is both plaintiff and defendant, in different rights, as for himself on the one side, and as executor on the other, this absurdity is involved. When adversary rights, as creditor and executor,

79. Condensed statement of facts by the editor.

or debtor and executor, meet in the same individual, the law considers the contest as settled—at least as long as the union exists. As soon, therefore, as it appears to the court that the same individual is both plaintiff and defendant, any judgment entered up in the cause is, to say the least erroneous, and should be reversed.

I am not prepared to say, whether a writ of error, or a motion to vacate, is most proper mode of proceeding in this case; but I am satisfied, that a writ of error is a proper remedy, although it may not be the only proper one.

The judgment of the superior court, reversing the original judgment, must be affirmed.

PER CURIAM. *Judgment of reversal affirmed.*⁸⁰

80. Under this rule an action at law cannot be prosecuted by a partner against the partnership, nor by a member against a voluntary association, nor by one partnership or association against another having a common member: *Blaisdell v. Ladd* (1843) 14 N. H. 129; *Portland Bank v. Hyde* (1834) 11 Me. 196; *Moore v. Denslow* (1841) 14 Conn. 235; *Eastman v. Wright* (1828) 6 Pick. (Mass.) 316.

The rule is limited to cases where the record shows that the same party is both plaintiff and defendant. *Van Ness v. Forrest* (1814) 8 Cranch (U. S.) 30; *Blanchard v. Ely* (1839) 21 Wen. (N. Y.) 342; *Mahan v. Sherman* (1844) 7 Blackf. (Ind.) 378.

SECTION 2. PLAINTIFFS IN ACTIONS ON CONTRACT.

TREAT v. STANTON.

Supreme Court of Errors of Connecticut. 1841.

14 Connecticut, 445.

This was an action of assumpsit brought by Amos Treat, as executor of Dolly Stanton, against John Stanton, executor of Adam Stanton, to recover certain moneys which the defendant's testator had received from the plaintiff.

* * * * *

* * * The defendant claimed, that the plaintiff was not entitled to recover in this action; 1st, because the legal right existing under the receipt, [mentioned in the opinion of the court], was only in the children of George Stanton; and consequently, the plaintiff had no right of action.

* * * * *

Verdict in favour of the plaintiff; and the defendant moved for a new trial.

* * * * *

STORRS, J.: Dolly Stanton, the plaintiff's testator, having, by her last will, among other bequests, given to five of her nieces the sum of four hundred dollars each, to be paid to them when they should arrive at full age, with a proviso, that in case either of them died without heirs, her share should be divided among the survivors, and that the sum of one hundred dollars out of each of said legacies should be expended, at the discretion of her executor, in the nurture and education of said nieces, if, in his opinion, necessary, with power to said executor to invest said sum in stocks, or loan the same on good security bearing interest; the plaintiff placed the amount of said legacies in the hands of the defendant's testator, who thereupon executed to the plaintiff the instrument in writing on which this action is brought, acknowledging the receipt thereof, and expressing that the same was so left to said nieces, and agreeing to retain the same in his hands until said nieces should arrive at full age (except such part thereof, not exceeding one-fourth, as the plaintiff should want to expend for their education), and to pay the same with interest to said nieces, by an order from the plaintiff, when they should become of age.

The first question is, whether the plaintiff is the proper person to bring a suit on this agreement.

It is a general principle, applicable to all actions at law, that they must be brought by the person whose legal rights have been affected, or, in other words, who has the legal interest in the cause of action (1 Chitt. Pl. 1.); since it is of legal rights alone that courts of law take cognizance, and that only in favor of those who are recognized as having those rights. In regard to contracts in particular, the general rule is correctly laid down by Chitty, in his treatise on Pleading (p. 2.), where he says, "In general, the action on a contract, whether express or implied, or whether by parol, or under seal, or of record, must be brought in the name of the party in whom the legal interest in such contract was vested." And the parties to a contract are the persons in whom the legal interest in the subject of it is deemed to be vested, and who therefore must be the parties to the action which is instituted for the purpose of enforcing it, or re-

covering damages for its violation. Not that the person to whom the promise is nominally made, is always to be considered as the real party to the contract; for if he is acting merely as an agent of another, or the promise is made to him as such, his principal is the person to whom the promise is deemed to be made, and therefore is the real party to the contract. If, however, such nominal promisee is an agent, and has a beneficial interest in the performance of the contract, or a special property in the subject-matter of the agreement, then the legal interest and right of action is in him. 8 Conn. Rep. 60; 1 Chitt. Pl. 7. It is not, in every case, however, that it is stated, in express terms, to whom the promise is made. In such case, the general principle is, that it is deemed to be made to the person from whom the consideration for the promise proceeded.

Applying these familiar principles to the contract in question, there would seem to be no difficulty in determining the point which we are now considering, unless indeed some exception can be shewn within which it is embraced. Although it is not in this contract expressly stated to whom the promise is made, yet it appears that the money which constituted the consideration for the promise of the defendant's testator, was received by him of the plaintiff; and also, that it was money, the legal title to which was in the plaintiff. He, therefore, is to be considered the person to whom the promise is made, and the party to the contract in whom is vested the legal interest in it. Hence it results, that the alleged violation of it is an injury to his legal rights, for which he is the proper person to bring this suit.

The defendant, however, insists, that the case is within a rule which creates an exception to the foregoing principles, that where one person makes a promise to another for the benefit of a third, the latter is the proper party to maintain an action upon it; and therefore claims that the legatees, and not the plaintiff, ought to have brought this suit. The principle is indeed thus laid down, in several cases of actions on simple contracts; and we are not disposed to question its correctness as applicable to those cases. It is, however, so far from being a universal rule, that it is quite limited in its application, and is true only in a qualified sense; and although the cases decided under it have been sometimes spoken of as exceptions to the elementary principles which have been mentioned, there is no evidence that

the courts have intended, in that class of cases, to depart in the least from those principles. It will be seen, by an examination of the cases referred to, that the principle is confined to those cases, where the third person, for whose benefit the promise was made, had the sole and exclusive interest in the subject of the promise, and the person to whom the promise was ostensibly made, for the benefit of such third person, being wholly destitute of interest, might more properly be considered an agent for such third person, than a principal in the transaction, and the person thus exclusively interested, therefore, the real promisee, rather than the person to whom the promise was made on his behalf. The rule is laid down with more precision and accuracy, by Chitty, where he says, that "the party, for whose sole benefit it is evidently made, may sue thereon in his own name, although the engagement be not directly to or with him." 1 Chitt. Pl. 4. It is very plain that the courts have not intended to relax, in any degree, the rule that a legal interest is requisite in the plaintiff. They only invest the party who is solely benefited by the promise, with that legal interest, and thus consider him as the real party to the contract. It is upon this ground that these cases are, for the most part, vindicated and approved.

In *Dutton v. Poole*, which is the leading case on this subject (reported in 2 Lev. 210 and also in T. Raym. 302), the father of the plaintiff's wife being seised of a wood, which he intended to sell to raise fortunes for younger children, the defendant, being his heir, in consideration that he would forbear to sell it, promised to pay his daughter, the plaintiff's wife, 1000 l. for which the action was brought and sustained. It is stated that some stress was laid upon the nearness of relationship between the plaintiff's wife and her father, to whom the promise was made; and Mr. Hammond, in his treatise on Parties to Actions, considers that the father must, in that case, have been deemed to have furnished the consideration, and acted as his daughter's agent.

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In *Schemerhorn v. Canderheyden*, 1 Johns. Rep. 139, the defendant, in consideration of an assignment, by his father, of his property, promised to purchase for his sister a cherry desk; and on the authority of *Dutton v. Poole* it was held that it was a promise to the sister, considering, undoubt-

edly, that she, and not her father, was the real promisee, and he only her agent in the transaction.

In *Arnold et al. v. Lyman*, 17 Mass. Rep. 400, where A, a debtor of B, conveys property to C, who, in consideration thereof, promises to pay certain debts of A, and particularly that which he owes to B; it was held, that C was liable to B for the amount of A's debt to him, in an action of assumpsit. The court say: "We think that the promise may be legally considered as made to the several creditors, whose debts the defendant undertook to pay, if they chose to avail themselves of his engagement. The promise was to pay certain particular debts; and there seems to be no reason why it should not be treated as a promise to the creditors."

In *The Company of Felt-makers v. Davis*, 1 B. & P. 98, 102, EYRE, Ch. J. says: "As to the case put at the bar of a promise to A, for the benefit of B, and an action brought by B, there the promise must be laid as being made to B, and the promise actually made to A. may be given in evidence to support the declaration." And in *Pigott v. Thompson*, 3 B. & P. 149, Lord ALVANLEY expresses the opinion, that if A let land to B in consideration of which the latter promises to pay the rent to C, C may maintain an action on that promise. The reason which he gives, is, that C would be only a trustee for A; thus placing it on the ground that C is to be deemed to be the real promisee, and so having the legal interest.

Without going into a more particular examination of the cases of this description, which have been referred to in the argument, it will be found that they have proceeded, substantially, on the ground that the sole and exclusive beneficial interest in the contract is in the person who has been allowed to bring the suit, and that the nominal promisee is only the person through whom the contract was made. No case has been cited, nor is it believed that any can be found, where, on a promise made to one sustaining the character of a trustee, the *cestui que trust*, or person ultimately interested, has been permitted to bring an action upon it. In such case, the obligation and legal responsibility is exclusively to the trustee, and must be enforced by him in a court of law, as remarked by Chitty: "The courts of law will not, in general, notice mere *equitable* rights, as contradistinguished from the strict *legal* ti-

tle and interest, so as to invest the equitable or merely beneficial claimant with the ability to adopt legal proceedings in his own name; although the equitable right embrace the most extensive, or even the exclusive, interest in the *benefit* to be derived from the contract or subject matter of litigation. This could not be disregarded, without destroying the fundamental distinction between courts of *law* and courts of *equity*, with regard to the remedy peculiar to each jurisdiction. If the *cestui que trust* were permitted to sue at law, in his own name, the benefits and protection intended to result from the intervention of a trustee, clothed with a legal title, might be lost, and the advantages, arising from giving courts of equity exclusive control over matters of trust, would be defeated. Besides, it would be impossible, consistently with the common principles of jurisprudence, to exclude the power of the trustee to sue in respect of his legal right; and it would be highly mischievous and unjust to permit the defendant to be harrassed by two actions upon the same contract or transaction. The *right of action at law* has, therefore, been wisely vested solely in the party having the strict *legal* title and interest, in exclusion of the mere equitable claim." 1 Chitt. Pl. 2.

In the present case, the plaintiff, as executor, sustained the character of a trustee, not only for the legatees, but also for the creditors of his testatrix, and the legal title to the money which formed the consideration for the defendant's promise. For the faithful performance of the trust, he and his sureties are responsible on the bond given to the judge of probate; and it is to that bond that those interested are to resort, if he fails in his duty. The money due to him from the defendant on this contract, forms a part of the trust fund with which he is to discharge his obligations as such executor and trustee. It is just and necessary, therefore, that he should have the control of that fund, and the legal means of obtaining and protecting it. The trust is a personal one, confided to him by the testatrix, of which it was neither intended that he should, nor is it in his power, to divest himself. He has not, in our opinion, attempted to do so. He has, in pursuance of the will, invested this portion of the money of his testatrix, with a view only of *guarding* it so as to enable himself to fulfill the terms of that instrument. For this purpose it was necessary that he should retain the entire control of it, without any interfer-

ence in any form, either by the legatees or any other person; and it is most evident that he intended to do so; for, by the very terms of the agreement, the defendant's testator was to pay over the money *on the order of the plaintiff*. In this loan to Stanton, Treat acted, not as the agent of the legatees, but on his own behalf. The legatees were minors at the time of making the contract and could not legally exercise any control over the subject. They had no power over or interest in the money, and could impart none to others. Treat acted not by their authority, but by that of the testator, given in the will. Indeed, it was wholly uncertain whether any of these legatees would ever have any title to this money or to what extent; since by the will, it will be perceived that contingencies might have occurred, which would have varied the amount to which they would be entitled, or indeed deprived them of it altogether. It is also obvious, that claims might exist against the estate, which would absorb the whole estate of the testatrix in the plaintiff's hands. But if the claim of the defendant is correct, the obligation of the plaintiff, as executor, would continue, and he be deprived of the means placed in his hands to discharge them. An account of his administration is, moreover, to be rendered, and settled, by the court of probate; until which it is uncertain what will finally remain for distribution under the will. To sustain the claim of the defendant, therefore, that the legatees are entitled to recover these moneys from the defendant, would be productive of the most glaring injustice, thwart the manifest intention of the testatrix, and of the parties to the agreement, and introduce a novel principle, which would be attended, in the management of trusts, with the utmost confusion and inconvenience.

* * * * *

The superior court is advised, that a new trial ought not to be granted.

In this opinion the other judges concurred, except CHURCH, J., who was absent.

New trial not to be granted.

TWEDDLE v. ATKINSON, EXECUTOR OF GUY.*Court of Queen's Bench. 1861.**1 Best and Smith, 393.*

The declaration stated that the plaintiff was the son of John Tweddle, and before the making of the agreement hereafter mentioned, married the daughter of William Guy, deceased; and before the said marriage of the plaintiff the said William Guy, in consideration of the then intended marriage, promised the plaintiff to give to his said daughter a marriage portion, but the said promise was verbal, and at the time of the making of the said agreement, had not been performed; and before the said marriage the said John Tweddle, in consideration of the said intended marriage, also verbally promised to give the plaintiff a marriage portion, which promise at the time of the making of the said agreement had not been performed. It then alleged that after the marriage and in the lifetime of the said William Guy, and of the said John Tweddle, they, the said William Guy and John Tweddle, entering into the agreement hereafter mentioned as a mode of giving effect to their said verbal promises; and the said William Guy also entering into the said agreement in order to provide for his said daughter a marriage portion, and to procure a further provision to be made by the said John Tweddle, by means of the said agreement, for his said daughter, and acting for the benefit of his said daughter, and the said John Tweddle also entering into the said agreement in order to provide for the plaintiff a marriage portion, and to procure a further provision to be made by the said William Guy, by means of the said agreement, for the plaintiff, and acting for the benefit of the plaintiff; they the said William Guy and John Tweddle made and entered into an agreement in writing in the words following, that is to say:

“High Coniscliffe, July 11, 1855.

“Memorandum of an agreement made this day between William Guy, of, etc., of the one part, and John Tweedle, of, etc., of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of

200 l. to William Tweddle, his son-in-law; and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay the sum of 100 l. to the said William Tweddle, each and severally the said sums on or before the 21st day of August, 1855. And it is hereby agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any court of law or equity for the aforesaid sums hereby promised and specified."

"And the plaintiff says that afterwards and before this suit, he and his said wife, who is still living, ratified and assented to the said agreement, and that he is the William Tweddle therein mentioned. And the plaintiff says that the said 21st day of August, A. D. 1855, elapsed, and all things have been done and happened necessary to entitle the plaintiff to have the said sum of 200 l. paid by the said William Guy or his executor; yet neither the said William Guy nor his executor has paid the same, and the same is in arrear and unpaid, contrary to the said agreement." Demurrer and joinder therein.

WIGHTMAN, J.: Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne v. Mason*, 1 Ventr. 6, in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

CROMPTON, J.: It is admitted that the plaintiff cannot succeed unless this case is an exception to the modern and well-established doctrine of the action of assumpsit. At the time when the cases which have been cited were decided the action of assumpsit was treated as an action of trespass upon the case, and therefore in the nature of a tort; and the law was not settled, as it now is, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained; nor was it settled

that the promisee cannot bring an action unless the consideration for the promise moved from him. The modern cases have, in effect, overruled the old decisions; they show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract, but that argument ought also to make the son liable upon it. I am prepared to overrule the old decisions, and to hold that, by reason of the principles which now govern the action of assumpsit, the present action is not maintainable.

BLACKBURN, J.: The earlier part of the declaration shows a contract which might be sued on, except for the enactment in sec. 4 of the Statute of Frauds, 29 Car. 2, c. 3. The declaration then sets out a new contract, and the only point is whether, that contract being for the benefit of the children, they can sue upon it. Mr. *Mellish* admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made. But he says that there is an exception; namely, that when the consideration moves from a father, and the contract is for the benefit of his son, the natural love and affection between the father and son gives the son right to sue as if the consideration had proceeded from himself. And *Dutton and Wife v. Poole*, 2 Lev. 210, 1 Vent. 318, aff'd, T. Raym. 302, was cited for this. We cannot overrule a decision of the Exchequer Chamber; but there is a distinct ground on which that case cannot be supported. The cases upon stat. 27 El. c. 4, which have decided that, by sec. 2, voluntary gifts by settlement after marriage are void against subsequent purchasers for value, and are not saved by sec. 4, show that natural love and affection are not sufficient consideration whereon an action of assumpsit may be founded.

*Judgment for the defendant.*⁸¹

81. This rule does not find much support in the American cases, though in a few states, notably Massachusetts, a very strict and technical view is taken, almost entirely precluding third persons from suing upon contracts. See 30 Cyc. 64, 65.

CUMBERLAND NATIONAL BANK v. ST. CLAIR.

*Supreme Judicial Court of Maine. 1899.**93 Maine, 35.*

This was an action of assumpsit upon the following guaranty executed by the defendants:

"Whereas Wilson & Berry, copartners of Camden, Knox Co., Maine, have sold to us all their right, title and interest in and to the machinery, pulleys, belts, couplings, hangings, and 16 feet of shafting now in the mill in said Camden occupied by them and known as the 'Bakery Building,' said machinery being mortgaged to Chase & Son & Co. of Portland, and sold to us subject to said mortgage.

"Now, therefore, in consideration thereof we hereby guarantee to said Wilson & Berry that we will assume said mortgage debt and pay the notes secured by said mortgage and hold all parties to said notes harmless from all damage on account of said notes.

November 29, 1892.

M. K. ST. CLAIR & Co."

* * * * *

J. H. and C. O. Montgomery, for defendants.

While courts have held that actions may be maintained by third parties for whose benefit a promise has been made, when the agreement is made to parties directly liable to them, they have disallowed such actions when not made to parties directly liable to the plaintiff.

The earliest and most constant courts to maintain the doctrine are the courts of New York. But that court says, "in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise." *Vrooman v. Turner*, 69 N. Y. 280; *Merrill v. Green*, 55 N. Y. 270.

In *Bohanan v. Pope*, 24 Maine, 93, it was agreed that the plaintiff was hired by Whitney and worked upon the logs in hauling and cutting them. Before hiring the writing was shown to him wherein defendant promised to pay.

In *Lewis v. Sawyer*, 44 Maine, 332, the money was put into defendant's hands for the use of the plaintiff.

In *Maxwell v. Haynes*, 41 Maine, 559, defendant received funds for which he promised to pay a debt of A. to C.

In *Dearborn v. Parks*, 5 Maine, 81, money was left in the hands of defendant to pay plaintiff a debt owed to him by A.

Meech v. Ensign, 49 Conn. 191, 44 Am. Reports, 225, is the argument against the doctrine and reviews the cases with great clearness.

Mellen v. Whipple, 1 Gray, 317, is also in line.

"It is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was made and was intended for his benefit. The fact that if the contract is carried out according to its terms would inure to his benefit, is not sufficient for him to demand its fulfilment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions." *Sayward v. Dexter, Horton & Co.*, 72 Fed. Rep. 765.

HASKELL, J.: Assumpsit to recover from the purchaser of mortgaged property, who assumed the mortgage debt and agreed to pay the mortgage notes, the contents of a promissory note secured by the mortgage.

The promise to pay the note was made with two persons, who with another were makers of it and personally liable therefor. The promise was for the benefit of the holder as well. Had the promise to pay been a covenant under seal with the covenantee, to pay either to him or to the beneficiary, the covenantee alone could sue, for the covenant would have been with him, and damages for the breach thereof would arise to him only, although for the benefit of another, who might bring the suit in the name of the covenantee, but for his own benefit. *Brann v. Maine Benefit Life Association*, 92 Maine, 341, and cases cited. If the deed contain no covenant to pay, but merely recitals from which a promise to pay would arise, or be implied, then assumpsit would lie in favor of either the grantee or beneficiary. *Baldwin v. Emery*, 89 Maine, 498. So where the promise is by parol, as in the case at bar, to assume the debt and pay it, the promise is with the debtor, and for his benefit, because payment will relieve him from the debt. So, too, it is for the benefit of the creditor, as an additional security. No good reason can be given why the creditor may not recover his debt upon a promise to pay it, impliedly to him. The law implies assumpsit where money is due and ought to be paid, if there be no express promise, but an express promise excludes an implied one. *Wirth v. Roche*, 92 Maine, 383; *Billings v. Mason*, 80 Maine, 496; *Wood v. Finson*, 89 Maine, 459. In the case at bar there was an express promise

with the debtor to pay the debt. The law implies a promise to the creditor also. He therefore may sue. It is true, that the beneficiary may not always sue where the fruits of a promise with another inure to his benefit, but only where the transaction fairly imports that right to have been within the contemplation of the parties, for an implied promise results from equitable considerations, that many times gives a remedy to prevent circuity of action, unnecessary delay, and perhaps the failure of justice altogether. For illustration, reverse the situation. A man without request of the debtor voluntarily pays the debt. The law will not imply a promise of the debtor to repay him. *Ames v. Coffin*, 89 Maine, 300; *Lafontain v. Hayhurst*, 89 Maine, 388; *Sanderson v. Brown*, 57 Maine, 308; *Hill v. Packard*, 69 Maine, 158.

*Exceptions overruled.*⁸²

82. Such a promise is not within the statute of frauds because founded upon a new and distinct consideration. *Merrill v. Near* (1830) 5 Wend. (N. Y.) 235; *Moore v. First National Bank* (1903) 139 Ala. 595; *Sweatman v. Parker* (1873) 49 Miss. 19.

The distinction between this rule and that permitting the sole beneficiary to sue is clearly pointed out by Mr. Hepburn in 30 Cyc. 67, article "Parties," as follows:

"When A has agreed with B, on a consideration moving from B, to pay to C a debt which B owes C, the prevailing American doctrine permits C, if his debt is still unpaid, to bring an action in his own name against A, for the breach of A's contract with B.

"*Not a beneficiary.* The current explanation of the rule is that the creditor of the promisee, in such a case, is a third person beneficiary, and can sue as such. Manifestly, however, the creditor cannot claim as sole beneficiary; in any normal case the promisee, whose debt will be discharged by the performance of the contract, is at least the primary beneficiary. In strictness indeed there is no legal ground on which the creditor of the promisee, as such, can claim a standing before the courts as beneficiary under the promise to his debtor. If a debt already exists from one person to another, a promise by a third person to pay this debt is for the benefit of the original debtor to whom it is made. At the most the creditor of the promisee is but an incidental beneficiary under the promise to pay his debt, and on principle and weight of authority the incidental beneficiary cannot claim as plaintiff.

"*Basis of creditor's right as plaintiff.* But although the creditor of the promisee cannot appear as a beneficiary, he can proceed against his debtor's promisor upon another ground. If the creditor can sue the promisee for his debt, and the promisee can sue the promisor for breach of his promise to pay this debt, it is evident that unless the procedure of the forum presents some obstacle there is no good reason why the creditor should not proceed directly against the promisor. The result is to accomplish through one action what would otherwise require two actions. But in this there is no need to assume a contractual interest in the creditor as against his debtor's promisor; the creditor of the promisee is 'allowed, by a mere rule of procedure, to go directly as a creditor against the person ultimately liable, in order to avoid circuity of action.'"

The rule allowing a beneficiary to sue is therefore a rule of substantive law, creating a new right of action, while the rule permitting the creditor of the promisee to sue merely simplifies the procedure in enforcing liabilities already conceded to exist. 30 Cyc. 66.

Doctrine of novation. It has been sought to justify the right of the creditor of the promisee to sue the promisor on the ground of a novation:

Urquhart v. Brayton (1878) 12 R. I. 169. But one of the essential elements of a novation is lacking, namely the discharge of the original debtor and the substitution in his place of the promiser.

MASTERSON v. PHINIZY. ✓

Supreme Court of Alabama. 1876.

56 Alabama, 336.

This action was brought by John T. Phinizy, against Thos. Masterson and J. T. Masterson; was commenced on the 13th July, 1874, and was founded on an attachment bond, given by the defendants, which was in the following words: "Know all men by these presents, that we, Thomas Masterson and —, are held and firmly bound unto John T. Phinizy, Eliza P. Phinizy, J. W. Falk, and Thomas Lile, in the sum of four thousand dollars, to be paid to the said John T. Phinizy, Eliza P. Phinizy, J. W. Falk, and Thomas Lile, their heirs, administrators, and assigns; for the payment of which, well and truly to be made, we bind ourselves, and each of us and our and each of our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 2d day of February, 1872. The above obligation is conditioned as follows: that whereas the above-bound Thomas Masterson, as the administrator *de bonis non* of the estate of Paul J. Watkins, deceased has, on the day of the date hereof, prayed an attachment, at the suit of himself as said administrator, for rent, for the sum of two thousand dollars, with interest from the 1st day of January, 1872, against said John T. Phinizy, Eliza P. Phinizy, J. W. Falk, and Thomas Lile, and has obtained the same returnable to the next term of the circuit court of said county of Lawrence: now, if the said plaintiff shall prosecute his attachment to effect, and pay the defendants all such damages as they may sustain from the wrongful or vexatious suing out of such attachment, then this obligation to be void," etc.

The complaint, as amended, averred that said attachment was wrongfully sued out; that no cause existed for suing out; that he (plaintiff) was not about to remove his crop

from the rented lands without paying the rent, and had not removed any part of it without the consent of the landlord; also, that the cotton levied on under the attachment belonged to him alone, and the other defendants in the attachment suit had no interest in it; and that he was the only person injured by the suing out and levy of the attachment, and the only person interested in this suit. The defendants demurred to the complaint as amended, on the ground that it showed no right of action in the plaintiff alone, and that the other obligees in the bond ought to have been joined as plaintiffs; but the court overruled their demurrer. * * *

* * * * *

BRICKELL, C. J.: The material ground of demurrer to the complaint, as amended, is, that the suit is brought by *one* only of the four obligees of the bond; and it is insisted in support of it, that an action for a breach of the condition of the bond, though it is averred the obligee suing alone sustained damage, is not maintainable without joining as plaintiffs all the obligees.

The bond is payable to the obligees jointly, and its condition is for the payment to them of "all such damages as they may sustain from the wrongful or vexatious suing out of the attachment." It contains no covenant to or with, nor any stipulation in favor of the obligees severally. The unqualified rule of the common-law is, that an action on a bond or covenant must follow the nature of the interest disclosed on its face. If the interest so disclosed is joint, the action must be in the name of all the living obligees. If the interest is several, the action must be several. Add. Con. 946; 2 Chit. Con. 1340. In *Gayle v. Martin*, 3 Ala. 593, a bond was executed for the replevy of a steamboat, payable to several libelants, with condition to pay several and distinct judgments in favor of each; and it was held, that the legal interest was vested in all the obligees, and all must join in an action for its breach. The precise question raised by this demurrer was presented in *Boyd v. Martin*, 10 Ala. 700, in an action on a bond given to obtain the issue of an attachment, which was levied on the property of one only of the several defendants and obligees. An action for a breach of the condition, it was held, was properly brought in the name of all the obligees.

This covenant or obligation is joint, or joint and several,⁸³ or several, according to the nature of the interest disclosed within its *four corners*. The action must follow the nature of that interest: there is no right of election in the obligees, to sue upon it severally or jointly, because of the damages resulting from its breach. 2 Chit. Con. 1351. The obligation or covenant will be construed joint or several, according to the interest of the parties, as that appears on its face, if the words are capable of that construction. To authorize the construction, when the interest is prima facie joint, that the obligees can take or sue severally, it must be manifest that it was intended a separate and distinct duty should arise to each of them. Add. Con. 947.

As we have said, the bond in all its terms is joint, not several. There is no ground for argument from these terms, or the purposes for which the bond is required, that will justify its interpretation as operating to create a several interest in the obligees. The indemnity of each and all the obligees, who are defendants in the writ of attachment, against any and all damages resulting from the wrongful or vexatious use of the process, is the purpose of the bond. Each one and all are entitled to its security. If one could sue, and recover the damages he had sustained, the penalty of the bond might be exhausted, and the others left remediless. The obligors would be vexed with several suits, and the courts left in doubt for whom judgment should be given. The averment that the appellee alone has sustained damage, cannot change the character of the obligation, or the nature of the interest it creates. The character and nature arise out of its terms; and these cannot be departed from, because damages result to one only of the obligees, or result to the obligees in different proportions. The demurrer to the complaint should have been sustained.

* * * * *

83. It may be both joint and several as to the promisors, but not as to the promisees. "One and the same contract, whether it be a simple contract or a contract by deed, cannot be so framed as to give the promisees or covenantees the right to sue upon it both jointly and separately." Dicey on Parties, Rule 14, p. 110.

"In other words, a covenant 'may be either a joint or several covenant, and it will depend upon the context whether it is to be taken as joint or several, but it cannot be both.' For 'it is fully established * * * that one and the same covenant cannot be made both joint and several as regards the covenantees.'" Id. 111.

For the error in overruling the demurrer to the complaint, the judgment must be reversed, and the cause remanded.⁸⁴

84. *The rule is general and applies to all contracts.* "All the persons with whom a contract is made must join in an action for the breach of it." Dicey on Parties, Rule 13, p. 104.

"A contract by one person with two jointly does not comprehend or involve a contract with either of them separately," as 'is evident from the well-known doctrine, that a covenant or promise to two, if proved in an action brought by one of them, sustains a plea which denies the existence of the contract.'" Id. p. 104.

"It is often hard to determine who are the persons with whom a given simple contract is made and who, therefore, must sue for its breach. The difficulty is often, though not invariably, one of interpretation, i. e., of determining from the words of a given contract whether it is to be interpreted as a contract with A and B jointly, or a contract with A and B severally." Id. p. 105.

When one coplaintiff refuses to join. This will not defeat the rights of the rest. "One of two coplaintiffs has a right to bring an action in the name of both, nor has the court any power to interfere, unless the coplaintiff's name be used, not only against his will, but fraudulently. Hence 'one of several partners has a right to use the name of the firm [i. e., the names of all the partners—Ed.] in order to bring an action. But a coplaintiff whose name is used without permission is not without protection. 1st. He may obtain an indemnity against costs from the party who makes use of his name; i. e., he may apply to the court to have such party's proceedings stayed till he gives security for costs. 2nd. He may release or settle the action. Any one of several coplaintiffs may give the defendant a release from the action, which is good, and may be pleaded, unless it is fraudulent.'" Dicey on Parties, 108

WRIGHT v. WILLIAMSON. ✓ 6782

Supreme Court of New Jersey. 1812.

3 New Jersey Law, 978.

The action below was brought by Williamson as acting partner of the late firm of Okee and Williamson, against Wright.

BY THE COURT.—~~The plaintiff below sued in his own name, for a joint contract; this cannot be sustained. Although the partnership was dissolved, the contract was, notwithstanding, joint.~~

*Judgment reversed.*⁸⁵

85. *General Rules as to Partners and Unincorporated Companies*, as given in Dicey on Parties, chap. VI.

"Rule 20.—A firm or an unincorporated company cannot sue in its name as a firm or as a company, but must sue in the names of the individual members of the firm or of the company."

"Exception 1.—Where an unincorporated company is empowered by statute to sue, etc., in the name of its public officer" [or in its own name as a firm or company.—Ed.]

"Exception 2.—Where an unincorporated company is being wound up."

"Rule 21.—All persons who are partners in a firm, or members of an unincorporated company, at the time when a contract is made with the firm or the company, should join in an action for the breach of it."

"Exception. One partner must or may sue alone on contracts made with him on behalf of the firm in the same cases in which an agent must or may sue on contracts made with him on behalf of his principal."

"Rule 22.—One partner or member of an unincorporated company cannot sue another upon any matter involving the accounts of the partnership or company."

"Exception 1.—Where there is an agreement which, through relating to partnership business, can be treated as separate and distinct from other matters in question between the partners."

"Exception 2.—Where the matters in respect of which an action is brought are connected with the partnership business only through the wrongful act of the partner sued."

"Rule 23.—Actions for breaches of contracts made with a firm must be brought:

"1. On the bankruptcy of the firm, by the trustee or trustees of the bankrupts.

"2. On the bankruptcy of one or more partners, by the solvent partners, together with the trustee, or trustees of the bankrupt partner or partners."

"Rule 24.—On the death of a partner, the surviving partners and ultimately the last survivor, or his representative, must sue on contracts made with the firm."

Incorporated companies, on the other hand, must sue in their corporate names. Dicey on Parties, Rule 25.

"In the absence of an enabling statute defining the rights and liabilities of the members, societies, associations, partnerships, and other bodies, combined under their own rule, for their own private benefit, and without any express sanction of law, are not, in the collective capacity and name, recognized at common law as having any legal existence distinct from their members." *Karges Furniture Co. v. Amalgamated Woodworkers Union* (1905) 165 Ind. 421.

At law, if the objection is properly taken, every member of an unincorporated association must be joined as a party defendant. In equity, if the members are numerous, a number of the members may be made parties defendant as representatives of the class: *Pickett v. Walsh* (1906) 192 Mass. 572.

Numbers immaterial. "The declaration shows that the obligee named in the bond is an unincorporated society, composed of many persons, of whom a few bring this action at law, on the bond, in their own names for the use of all the members. By the rule at common law this is forbidden. It can be maintained only in the names of all, however numerous." *O'Connell v. Lamb* (1895) 63 Ill. App. 652.

MORRISON v. WINN.

Court of Appeals of Kentucky. 1808.

Hardin, 480.

The CHIEF JUSTICE delivered the following opinion of the court: Lettice Winn, executrix of George Winn, deceased,

and Adam Winn, brought an action of assumpsit against Morrison, and declared therein, upon an assumpsit made by the said Morrison, to Adam Winn, and George Winn, in his lifetime, jointly; and judgment, upon a writ of inquiry was rendered against Morrison, in favor of Adam Winn. and Lettice, the executrix of George Winn, deceased.

The question made by the first assignment of error is, can the action be maintained jointly by the surviving promisee, and the executrix of the deceased promisee?

This question, considered independently of the Act of Assembly "concerning partitions, joint rights, and obligations," is free from difficulty. By the common law, joint rights survive to, and become vested in the surviving joint tenant. But for the encouragement of trade and husbandry, it is held that a stock on a farm, though occupied jointly, and also stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common, and not as joint property; and there shall be no survivorship therein. 3 Black. Com. 399; 3 Bac. Ab. 589.

This, however, must be understood of the right of property only; for although the duty does not survive, the remedy does, and therefore the survivor must sue alone; and when he recovers, he shall account with the executor of the deceased partner, for his share. The executor and survivor cannot join in an action against the debtor. 3 Bac. Ab. 589; 1 Ld. Raym. 340.

The assumpsit here, having been made to Adam Winn and George Winn, jointly, must be considered as a partnership transaction; so that, although the right of property did not, on the death of George, wholly survive to Adam, yet the right of action did; and the suit was maintainable by him alone, and not by him and the executrix of George, jointly.

The Act of Assembly before recited, at first produced some difficulty; but upon full consideration, we think it does not alter the case. It provides, in substance, that after the death of one joint tenant, his rights shall be preserved, and go to his representatives, in the same manner as if he and the survivor had been tenants in common. This act was made to preserve the right of property, which, in many cases, would have been lost to the representatives of the decedent, by the *jus accuscendi*; and not to change the remedy or action for the recovery of a chose in action, belonging to the joint tenants. It places the survivor and the

representatives of the deceased joint tenants, in all cases, upon the same footing, as in the case of joint traders, or farmers, before mentioned. Where the right of property is considered as a right in common, and therefore not subject to survivorship, but the right of action strictly joint, and therefore in all cases vesting solely in the surviving party.

We are more strongly inclined to this interpretation of the act, because, in the language of Lord Holt, in the case cited from Raymond, "It would make strange confusion that one plaintiff should sue in his own right, and the other in another's."

It is not intended to be laid down as a principle, that tenants in common, must, in all cases, sue jointly. The general rule is otherwise; but the case before the court is not within the general rule, but within the exceptions to it, which declare, that whenever the thing or demand is dis-severable in its nature, the action must be brought by the tenants in common, jointly. And if, however, this case were considered in every respect, a proper tenancy in common, and that the partners might, and ought to have brought their actions for a moiety of the debt, severally, then it would follow that Adam Winn, and the executrix of George Winn, ought to have brought their actions severally, for one moiety each, and must be equally fatal to the present suit.

In every way of viewing the subject, we are of opinion, the suit is not maintainable by the plaintiffs in the court below, jointly; and consequently, that the whole of the proceedings are erroneous, and must be reversed. It is unnecessary to consider the other errors assigned.⁸⁶

86. "The right of action on a contract made with several persons jointly passes on the death of each to the survivors, and on the death of the last to his representatives." Dicey on Parties, Rule 16, p. 128.

The same rule applies in cases of partners and members of unincorporated societies. See Dicey on Parties, Rule 24, p. 162. "The same rule appears to hold good with regard to unincorporated companies, supposing of course that these companies are not empowered to sue by a public officer." *Id.*, 162.

FORD v. WILLIAMS.

*Supreme Court of the United States. 1858.**21 Howard, 280.*

Ford lived in New York, and brought an action against John S. Williams & Brother upon the following contract:
Baltimore, October 31, 1855.

For and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, we have this day purchased from John W. Bell, and agree to receive from him in all the month of February next, at his option, two thousand barrels Howard street super flour, we paying for the same at the rate of nine dollars per barrel, on the day the said flour is ready for delivery.

JOHN S. WILLIAMS & BRO.

Upon the trial in the court below, much evidence was given which it is not necessary to recite in the present aspect of the case. The court, on the application of the defendants' counsel, instructed the jury that, upon the above contract, Ford could not recover. The only question in the case was whether, assuming the contract to have been made for the benefit of the plaintiff, without any disclosure to the defendants of his interest, he was competent to maintain a suit in his own name.

GRIER, J., delivered the opinion of the court.

The single question presented for our decision in this case is, whether the principal can maintain an action on a written contract made by his agent in his own name, without disclosing the name of the principal.

* * * * *

The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. But the agent, who binds himself, will not be allowed to contradict the writing by proving that he was contracting only as agent, while the

same evidence will be admitted to charge the principal. "Such evidence (says Baron PARKE) does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of principal." (See *Higgins v. Senior*, 9 Meeson and Welsby, 843.)

The array of cases and treatises cited by the plaintiff's counsel shows conclusively that this question is settled, not only by the courts of England and many of the States, but by this court. (See *New Jersey Steam Navigation Co. v. Merchants Bank*, 6 How. 381 et cas. ib. cit.)

The judgment of the court below is therefore reversed, and a *venire de novo* awarded.⁸⁷

87. "A person can sue on any contract made on his behalf, whether made by an agent authorized to act for him at the time, or made without his authority, or even without his knowledge, but subsequently ratified by himself." Dicey on Parties, 130.

NABORS v. SHIPPEY.

Supreme Court of Alabama. 1849.

15 Alabama, 293.

This was an action of assumpsit, instituted by defendant in error, as the agent of one John Kirby, against the plaintiff in error, in a justice's court, and taken by appeal to the circuit court. The statement, or declaration, was on the common counts. Plea, non assumpsit. By the bill of exceptions it appears, that defendant in error was the known agent of Kirby, and had been such for some time; that an execution in favor of Kirby had been levied on the property of one George Branch, the defendant therein, and that defendant in error, as the agent of said Kirby, on the undertaking of plaintiff, *verbally*, to pay the debt, released the levy. The debt not having been paid, the defendant, in his own name, as the agent of Kirby, sued the plaintiff, to recover the amount thereof.

The court was requested by plaintiff in error, to charge the jury, that the action could not be maintained, on this state of facts, in the name of defendant in error although

he was described in the pleadings as the agent of Kirby, but that it should have been brought in the name of Kirby, the principal. This charge the court refused to give, but charged the jury, that if there was any force in the objection, it came too late, the plaintiff in error having gone to trial on the general issue. To the refusal to charge as requested, and to the charge given, the plaintiff in error excepted, and now assigns them as error.

COLLIER, C. J.: Ordinarily, an agent contracting in the name of his principal, is not entitled to sue, nor can he be sued on such contracts. Thus an agent selling goods for his principal, and in the name of the latter, cannot maintain an action for the purchase money. * * *

The cases in which the agent has personal rights, and may maintain an action on a contract, in which his principal is interested, are thus stated. "First, where the contract is made in writing, expressly with the agent, and imports to be a contract personally with him, although he may be known to act as an agent. Secondly, where he is the only known or ostensible principal, and therefore is, in contemplation of law, the real contracting party. Thirdly, where by the usage of trade, or the general course of business, he is authorized to act as the owner, or as principal contracting party, although his character as agent is known. Story on Ag. Par., 393. The facts recited in the record, do not bring this case within an exception to the general rule, which declares, that an agent shall not sue on contracts made by him in the name, and on the behalf of the principal. The contract was verbal, the consideration for the defendant's promise was the release of property which had been levied on to satisfy a judgment in favor of the principal, as the defendant very well knew. Upon principle, as well as authority, this promise inured to the principal, and he alone could sue for its breach.⁸⁸

88. *Where a party only pretends to act as agent*, there are two rules, given in Dicey on Parties as follows:

"Rule 18.—A person who enters into a contract in reality for himself, but apparently as agent for another person, whom he does not name, can sue on the contract as principal, * * * the reason for this being, that the defendant cannot be supposed to have entered into the contract in reliance on a principal whose name was not known to him." Pp. 143, 144.

"Rule 19.—A person who contracts, in reality for himself, but apparently as agent for another person, whose name he gives, cannot sue on the contract as principal. * * * To allow him to sue would be to violate the 'rule of law, that if a person intends to contract with A, B cannot give himself any right under [the contract].'" Pp. 144, 147.

The reason of the rule was stated by the Court of King's Bench in *Cothay v. Fennell* (1830) 10 B. & C. 671, as follows: "If an agent makes a contract in his own name, the principal may sue and be sued upon it; for it is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made."

In some cases the agent is the only person competent to sue. These are (1) where an agent is contracted with by deed in his own name; (2) where the agent is named as a party to a bill of exchange, etc.; (3) where the right to sue on a contract is by the terms or circumstances of it expressly restricted to the agent. *Dacey on Parties*, 134, 135. In other cases where the agent may sue, the principal also has the right, so that the suit may be brought by either one. *Dacey on Parties*, 136, 140.

* * * * *

WILLIAMS v. COWARD.

Supreme Court of Pennsylvania. 1852.

1 Grant's Cases, 21.

WOODWARD, J.: A married woman can neither sue nor be sued on her contract made during coverture. If she contract for necessities or for goods that go to the use of her husband, the law presumes her to be his agent, and treats the contract as his, and the suit must be against him alone. It is only when an action is brought on her antenuptial contract that she is to be joined as a coplaintiff or defendant with her husband. *Nutz v. Reutter*, 1 W. 229. And this because in case of the husband's death, the action must survive. But in an action on a contract between two married women, made after coverture, neither wife should be joined. If any right of action accrued, it belongs to the husband of the one wife, and whatever liability is created, attached to the husband of the other. Though the wives may have created the cause of war, they are to be regarded as the ministers of their lords, and the battle is to be fought by them single handed.,

These rules and principles were all violated in the case before us. Mrs. Coward deposited moneys with Mrs. Williams to the amount of \$600, and drew upon her for various sums, until the balance was reduced to \$143.50, which, with \$22 interest claimed, amounting to \$165.50, are the moneys for which this suit is brought, which were her earnings

during coverture, and not property of her separate estate. Neither wife was a *feme sole* trader.

The plaintiff's counts all charge an assumpsit, by *Moses Williams and Elizabeth, his wife, v. Peter Coward and Ann, his wife*, and the plaintiffs have a verdict and judgment. There is nothing in the common law of the marriage relations, and nothing in the statutory modifications of it to justify such misjoinders, and the judgment is accordingly reversed, and restitution awarded of the moneys collected on the execution.⁸⁹

89. *General Rules as to Husband and Wife*, as given in Dicey on Parties, chap. VIII.

"Rule 29.—A wife cannot during coverture, sue without her husband."

"Subordinate Rule.—A husband cannot bring an action against his wife, or a wife against her husband."

"Rule 30.—A husband and wife must sue jointly in two cases, sc.: 1. On contracts made by the wife before marriage. 2. On contracts in which the wife claims as executrix or administratrix."

"Rule 31.—A husband may sue either alone or jointly with his wife in three cases, sc.: 1. On negotiable instruments (e. g., bills of exchange) given to his wife before marriage. 2. On contracts made after marriage with his wife alone. 3. On contracts made after marriage with himself and his wife."

These rules are largely the result of the common law conception of the unity of husband and wife and of the characteristic incidents of the marriage relation. The reasons upon which they rest belong primarily to the subject of domestic relations, and will not, therefore, be discussed here.

Statutes have in all States materially changed the common law doctrines regarding husband and wife and the rules relative to proper parties in actions by and against married persons.

RAYMOND v. FITCH.

Court of Exchequer. 1835.

2 Crompton, Meeson and Roscoe, 588.

LOED ABINGER, C. B.: The demurrer to the first breach gives rise to this question, whether an executor can sue for the breach of this covenant, not to fell, stub up, head, lop, or top timber trees excepted out of the demise, such breach having been committed in the lifetime of the testator and no part of the timber, loppings, or toppings, appearing to have been removed by the defendant. This question was argued in the latter part of the last term, before my Brothers PARKE, BOLLAND, GURNEY, and myself,

and stood over, that we might more attentively consider how far the modern decisions, referred to on the argument, had overruled or qualified the old authorities. Those authorities are uniform, that the present representative may sue, not only for all debts due to the deceased, by specialty or otherwise, but for all covenants, and indeed all contracts with the testator, broken in his lifetime; and the reason appears to be that these are choses in action, and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the testator, and is in law the testator's assignee. And this right does not depend on the equity of the statute, 4 Ed. 3 c. 7, but is a common law right, as much as the right to sue on a bond or specialty for a sum certain due in the testator's lifetime. The maxim that "*actio personalis moritur cum persona*," is not applied in the old authorities to causes of actions on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representative by the statute law. The authorities as to actions of covenant will be found in Com. Dig. "Administrator," B 13, "Covenant," B 1: Bacon's Abridgment, "Executors and Administrators" N; and in the cases of *Mason v. Dixon*, Sir William Jones, 173; *Morley v. Polhill*, 2 Ventr. 56, 3 Salk. 109, pl. 10, which was the case of an action by the executor of a deceased bishop for a breach in his lifetime of a covenant to repair in a former bishop's lease; *Smith v. Simonds*, Comberbach, 64, in which an administrator *de bonis non* recovered on a breach in the time of the testator for not discharging the land from encumbrance; and lastly, *Lucy v. Levington*, 2 Lev. 26, 1 Ventr. 176, where the executor recovered for a breach in his testator's life of a covenant for quiet enjoyment. The old authorities are also many, that an action will lie upon every breach of contract, though not under seal. In March, p. 9, pl. 23, Justice JONES said, "that it was agreed by the court, in what case soever there is a contract made to the testator or intestate, or anything which ariseth by contract, there an action will lie for the executor or administrator; but personal actions die with the testator or intestate." And in 9th Reports, 89 a, *Pinchon's case*, in which the question was, whether an ac-

tion of *assumpsit* for payment of a debt lay *against* an executor, it is laid down as follows: "As to the other objection, that this personal action of trespass on the case *moritur cum persona*, although it is termed trespass, in respect that the breach of promise is alleged to be mixed with fraud and deceit, to the special prejudice of the plaintiff, and for that reason it is called trespass on the case; yet that doth not make the action so annexed to the persons of the parties, that it shall die with the persons; for then, if he to whom the promise is made dies, his executors should not have any action, which no man will affirm; and an action *sur assumpsit*, upon good consideration, without specialty, to do a thing, is no more personal, i. e., annexed to the person, than a covenant by specialty to do the same thing;" and in Bacon's Abr. "Executors" (N), "An executor stands in the place of his testator, and represents him as to all his personal contracts, and therefore may regularly maintain any action in his right, which he himself might." These authorities have certainly been limited by the modern decisions, quoted on argument, and are to be understood with some qualification; but it will be found that none of those qualifications affect the present case. The rule that the executor may sue upon every covenant with his testator broken in his lifetime, has been directly qualified by the decisions in the two cases of *Kingdon v. Nottle*, 1 M. & Selw. 355, and 4 M. & Selw. 53, followed by that of *King v. Jones*, 5 Taunt. 518, 1 Marshall, 107, in which cases it was held, that, where there are covenants real, that is, which run with the land and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff. These cases go further, and they do not apply to the present; for there is no doubt but that the covenant in question is purely collateral, and does not run with the land; for the trees being excepted from the demise, the covenant not to fell them is the same as if there had been a covenant not to cut down trees growing upon an adjoining estate of the lessor. It is a security by specialty given by the lessee to the lessor, not to commit such a trespass during the lease, which may continue beyond the lessor's life. For the breach of such a covenant after the death of the covenantee, the heir or devisee of the

land on which the trees grow could not sue; the executor would be the proper party, as the covenant is collateral, and is intended not to be limited by the life of the covenantee; and if he could not sue, no one could. It is equally clear that the heir or devisee could not sue for a breach of the covenant in the time of the ancestor or deviser, and the executor, therefore, must sue, or all remedy is lost. These decisions, therefore, do not affect the present case. The old authorities, with respect to the right of the personal representative to sue on all contracts made with the deceased, have also been qualified by the modern decision of *Chamberlain v. Williamson*, 2 M. & Selw. 408, in which it was held, that the administrator of a woman could not sue for a breach of contract to marry the intestate, the declaration not stating any ground of injury to the personal estate; and in giving judgment Lord ELLENBOROUGH enumerates other instances of contracts, the breach of which imports a damage only to the person of the deceased, such as implied contracts by medical practitioners to use a proper portion of skill and attention, and for which the personal representative could not sue; and the argument on the part of the defendant in this case was, that the same limitation of the old authorities must be applied to all contracts except such as directly relate to the personal estate, and the performance of which would necessarily be a benefit, and the breach a damage, to the personal estate of the testator, whether such contracts are under seal or not; and that upon such contracts the executor could not sue without alleging a special damage to the personal estate. The case certainly does not go that length; and we think that such an extension of the doctrine laid down in it is not warranted by law, and that it cannot be extended to a contract broken in the lifetime of the deceased, the benefit of which, if it were yet unbroken, would pass to the executor as part of the personal estate; at all events, not to such a contract under seal. The present case is one of that description—it is a case more favourable to the executors than those of *Morly v. Polhill*, *Smith v. Simonds*, and *Lucy v. Levington*, in which the covenant did run with the land; and if the last case is to be considered as having been decided, as was suggested in the argument before us, on the ground that the loss of rents and profits by an eviction of the testator was an injury to the personal

estate (though such a ground is not intimated in either report), it is difficult to say that the loss of the shade and casual profits of trees is not equally so. We, therefore, think that our judgment must be for the plaintiffs.

*Judgment for the plaintiffs.*⁹⁰

90. *General Rules as to Executors and Administrators*, as given in Dicey on Parties, chap. X.

"Rule 41.—The personal representatives of a deceased person (i. e., his executors and administrators) can sue on all contracts of whatever description made with him, whether broken before or after his death."

"Exception 1.—Contracts, the breach of which occasioned merely personal suffering to the deceased."

"Exception 2.—Contracts limited to the lifetime of the deceased."

"Exception 3.—Covenants real broken during the lifetime of the deceased."

"Exception 4.—Contracts on which the deceased must have sued jointly with other persons."

"Subordinate Rule I.—An executor can commence an action before probate, but an administrator cannot commence an action before letters of administration granted to him."

"Subordinate Rule II.—On the death of a plaintiff the action can be carried on by his executor or administrator." [This rule is statutory. At common law the death of a plaintiff caused the action to *abate*, and it was necessary for a new action to be brought by the personal representative. 3 Bl. Com. 302; Tidd's Prac. 846 and 1024.—Ed.]

"Rule 42.—An executor or administrator:

"1. Must sue in his representative character on all contracts made with the deceased.

"2. May sue either in his representative or in his personal character on contracts made with him as executor after the death of the deceased."

"When a contract is made with an executor, he may sue either in his own name personally (as being the party contracted with), or in his representative character, if the money to be recovered would be assets of the estate."

"Subordinate Rule.—An executor or administrator cannot join claims made in his representative with claims made in his personal character."

"Rule 43.—Coexecutors or coadministrators must all join as plaintiffs in an action."

"Exception 1.—Where a contract is made with some of several coexecutors jointly."

"Exception 2.—Where an executor renounces the executorship."

"Subordinate Rule.—One coexecutor or coadministrator cannot bring an action against another concerning matters connected with the executorship."

"Rule 44.—On the death of a coexecutor or coadministrator, his rights of action pass to the survivors, and ultimately to the last survivor."

"Rule 45.—The executor of a sole or of a sole surviving executor represents the original testator, but the administrator of an executor does not represent the testator nor does the administrator of an administrator or the executor of an administrator represent the original intestate."

BALTIMORE AND POTOMAC RAILROAD COMPANY
v. TAYLOR.

Court of Appeals of the District of Columbia. 1895.

6 Appeal Cases, 259.

This is a suit to recover damages for injury to the rental value of certain real estate in square 268, in the city of Washington, alleged to have resulted from the unlawful occupation of the adjacent streets by the appellant.

* * * * *

MORRIS, J., delivered the opinion of the court.

There seem to be five questions raised by the appellant: 1st. That the suit should have been instituted by and in the name of the guardian, and not in the name of the children themselves, by their next friend; * * *

1. At first sight, at least, it seems to be a rather novel and startling proposition of law that any person, who has both the legal title to property and its beneficial ownership, should not be entitled to bring suit for injury to the usufruct of it. It is not contended that minors may not, by next friend, institute suit in ejectment for the recovery of real estate, or any other suit proper or necessary to preserve the property or to insure its usefulness. The claim is, that as a guardian is entitled to take possession of real estate and collect the rents and profits for the benefit of his ward, and is given by law the right of control and management of it, as well as the right to execute leases, releases, receipts and acquittances, therefore he, and not the ward, is the proper person to bring suit for the recovery of rent, and for injury to the rent value. The motive for this contention, the appellant does not hesitate to avow, consists in the fact that the statute of limitations may be available against a guardian, as claimed by counsel, while it is unavailable against minors.

Originally at the common law a minor could not maintain any suit; for he was disqualified by his minority from binding himself by any legal act. But it was very early settled that he could sue by guardian; and the statute of 13 Edward 1 made him competent to sue by next friend. Since that statute there never has been any question as to the

right of a minor to sue, either by guardian or by next friend, as the case may be, in any matter whatever in which suit might be maintained by an adult. And it is quite clear that in this is included the right to sue for diminution of the rental value of his own property, unless there has been some statute by which that right has been denied to him and his guardian has been substituted in his place. We fail to find any such statute.

The rights of guardians in this regard should not be confounded with those of executors or administrators, or, in some cases, trustees and receivers. These have a legal title in them, and as to all the world except their beneficiaries, the right of absolute ownership. There is neither legal title nor ownership of any kind in guardians. What they do, they do in the name of their wards, on their behalf, and for their sole and exclusive benefit. A case has been cited, *Smith v. Williamson*, 1 H. & J. 147, in which a father, as the natural guardian of his minor child, was held entitled to maintain replevin. But any person may maintain replevin and trover who has a present right of possession; and undoubtedly a guardian has the right of possession of the personal property of his ward. A guardian is no more than a custodian. He is a custodian both of real and of personal property, as well as of the person of the minor. As the custodian of personal property, he may, in his own name, bring any suit that has reference merely to the question of custody or possession. But neither in reference to personal property nor in reference to real estate should he bring suit in his own name, where the question of right or title is involved; for he has neither right nor title in the premises. The right and title are in the ward; and it is proper always and in all cases to bring suit in the name of the ward. Guardianship in *socage* has never existed in the District of Columbia, and cannot exist under our law to direct descents; and whatever may have been the rights of a guardian in *socage*, a general guardian appointed under statute cannot possess them, unless they are given by the statute. As we have said, we find no provision in any statute law in existence in the District of Columbia that either expressly or by necessary inference gives a guardian the authority to sue in his own name for injuries to the rights of his ward. A certain specific power to sue in a certain case (Act of Maryland of 1729, chap. 24, sec. 7), or the

power to execute conveyances of the ward's estate in certain specified cases (Rev. Stat. for D. C., sec. 651), cannot be construed to give general and unlimited authority to bring suit. The inference would rather be to the contrary.

We have no doubt that, except in some particular cases, such as those to which we have just referred, the rule is universal in the United States, that suits with respect to the property of a ward, where recovery is sought for his benefit, must be in the name of the ward, and not in the name of his guardian, unless statutory authority is given to the latter to so institute the suit, and the only point as to which there may be doubt or controversy is whether the suit should purport to be by a guardian or by next friend. It does not seem to us that it is of much consequence which way it is brought, as the court will have power to direct a change from the one to the other, as occasion may require, both being officers of court for the purpose of such suits. *French v. Marshall*, 136 Mass. 556; *Riggs v. Zaleski*, 44 Conn. 121; *Thomas v. Dike*, 11 Vt. 273; *Bradley v. Amidon*, 10 Paige, 239; *Stafford v. Roof*, 9 Cowen, 626; *Hoare v. Harris*, 11 Ill. 24; *Fox v. Minor*, 32 Cal. 112; *Deford v. Keyser*, 30 Md. 179; *Mayer v. Norman*, 4 Md. 352. Three cases are cited to the contrary, two of which have apparently been overruled; and the other is based on a special statute.

There is no danger, it seems to us, that the difficulty will arise, which is apprehended by counsel for the appellant, that, for the same cause of action, a defendant might have to respond to two suits, one by the guardian and the other by the ward. When there is a recovery in a suit instituted by or in the name of the true beneficiary, there is no danger that any court will permit another recovery in the name of a merely formal party, who has no real interest in himself. Nor is there any danger that the act of a guardian, performed within the sphere of his duties, will not be given its full and proper effect in any proceeding instituted by or in the name of the ward. The act of the guardian so performed is the act of the ward, and can be shown against the ward in any proper proceeding.

We are of opinion, therefore, that this suit was properly instituted in the name of the minor children who have been made the plaintiff in it, and that it is not objectionable because instituted by next friend, instead of by guardian.

SECTION 3. DEFENDANTS IN ACTIONS ON CONTRACT.

ANNETT v. CARSTAIRS.

*Court of King' Bench. 1813.**3 Campbell's Nisi Prius, 354.*

This was an action for the plaintiff's wages and disbursements as master of the ship *Airly Castle*, of which the defendants were alleged to be the owners.

* * * * *

LORD ELLENBOROUGH: ' We are here to consider, with whom has the plaintiff contracted? There is express privity of contract between him and *Masson*. The legal ownership of the ship thus becomes immaterial. The transfer of the title to the defendants did not at all affect the relation subsisting between *Masson* and the plaintiff. The plaintiff was employed by *Masson* originally, and continued to treat him as his employer throughout. What right then can he have to resort to the defendants? It might as well be said, that if I mortgage my estate, my steward, who continues to manage it for my benefit, may maintain an action for work and labour against the mortgagee. Title has nothing to do with these cases. We must look to the contract between the parties.

Plaintiff nonsuited.

 STEARNS v. FOOTE.

Supreme Judicial Court of Massachusetts. 1838.

20 Pickering, 432.

WILDE, J., delivered the opinion of the court. The defendant is charged with the breach of a contract in writing, whereby he undertook and promised the plaintiffs, among other things, to sell and deliver to them all the wool he should cut annually for five years from and after the first day of June, 1833; also all the wool which should be cut

annually from the flocks of his two sons, Daniel Foote and Asaph D. Foote, for the same time. By the contract offered in evidence on the trial, it appears that it was signed not only by the plaintiffs and defendant, but also by the defendant's two sons above named. The defendant objected to the introduction of this contract, as being variant from that set out in the declaration; but the objection was overruled, and we think the ruling was clearly right.

On the face of the contract it is declared to have been made by the defendant of the one part, and the plaintiffs of the other part. This clause conclusively shows that they alone were the contracting parties, and controls the subsequent language of some parts of the contract, by which it might otherwise be inferred, perhaps, that the defendant and his two sons were joint contractors. But if that were the case as to some parts of the contract, still this action might be maintained, for the promise set out in the declaration is expressly made by the defendant alone. If the signing of the contract by the defendant's two sons has any legal effect, it would only be evidence of a parol promise of the sons to their father to co-operate with him for the purpose of enabling him to fulfill his contract with the plaintiffs. But however this may be, it is very clear that the promise on which this action is founded, is, in express terms, the sole promise of the defendant.

The other exceptions to the decisions of the presiding judge at the trial, appear to us to be equally unfounded. It has been argued that as the defendant could not make a valid sale of property belonging to his sons, his agreement or promise to make such a sale at a future time must consequently be a void promise. But this consequence does not follow, for he might have procured a title, and if he has failed so to do, he is responsible in damages. An agreement that a stranger shall convey property or perform services for another, is a valid contract, although the promisor may perhaps be unable to fulfill it. (*Vide Ante*, 105.)

*Judgment on the verdict.*⁹¹

91. *General Rules as to Defendants*, as given in Dicey on Parties, chap. XI.

"Rule 46.—No person can be sued for the breach of a contract who is not a party to the contract.

"The ground on which one person is liable in an action on contract at the suit of another is, that he has made to the latter person, either directly or indirectly, either expressly or as the result of his acts, such a promise as the law considers binding, and has broken this promise. No one, therefore, who

is a stranger to a contract can be sued upon it; or, in other words, no one can be sued for the breach of a promise except the person who has made the promise. * * *

"Rule 47.—The person to be sued for the breach of a simple contract is the person who promises or who allows credit to be given to him.

"Exception 1.—Actions against a person appointed by statute to be sued on behalf of others.

"Exception 2.—Actions on some contracts implied by law or actions *quasi ex contractu*.

"Rule 48.—The person to be sued for the breach of a contract by deed is the person by whom the contract is expressed by the deed to be made, i. e., the covenantor."

NATHANSON v. SPITZ. ✓

Supreme Court of Rhode Island. 1895.

19 Rhode Island, 70.

Assumpsit on certain checks signed by defendants Adams & Spitz. Certified from the common pleas division on demurrer to a plea in abatement.

April 17, 1895. TILLINGHAST, J.: At the time of the suing out of the plaintiff's writ in this case, the defendants, Samuel Adams and Jacob Spitz, were copartners in business under the firm name of "Adams & Spitz," at Boston in the State of Massachusetts, where they both resided. The writ was served by arresting the defendant Spitz while temporarily in this State, and by sending an attested copy of said writ by mail to the defendant Adams, at Boston. The defendant Spitz entered a special appearance for himself and filed a plea in abatement on the ground that there had been no legal service upon the defendant Adams, the other joint obligor in the contract sued on; to which plea the plaintiff demurred. The only question raised, therefore, by the pleadings is as to the sufficiency of said service. The substance of the contention of counsel who appears for said Spitz in support of his plea in abatement is, *first*, that the liability of partners on a firm obligation is, during the lives of the partners, joint and not joint and several; and hence that the partners must sue and be sued *jointly*; and *second*, that in regard to service of process, the common law makes no distinction between partners and other joint

obligors, and hence that they all must be served with process before judgment can be obtained against any of them, even though some are nonresidents.

As to the first point. It is doubtless true that independently of any statute the liability of a partnership for the debts thereof is a joint and indivisible liability; and hence that all of the partners must be joined in a suit for recovery of such debts. Dicey on Parties, Truman's Ed. p. 285, Rule 56; Bates on Partnership, sec. 1049 and cases cited; *Pearce v. Cooke*, 13 R. I. 184; *Page v. Brant*, 18 Ill. 37; *Kent v. Holliday*, 17 Md. 387.

As to the second point. At common law, when one of several joint defendants was out of the jurisdiction of the court, so that it was impossible to obtain service upon him, the plaintiff might institute proceedings of outlawry against such nonresident defendant, and after judgment of outlawry had been obtained against him the plaintiff could proceed to recover a separate judgment against the defendants served with process. 3 Cooley's Blackstone Comment. 281-283; *Edwards v. Carter*, 1 Strange, 473; Tidd's Practice, 130; 1 Chitty on Pleading, 42. The proceeding of outlawry in civil cases, however, is unknown in the United States; and if there are any cases of outlawry in criminal cases even, they are very rare. In England, also, it has long been obsolete in civil proceedings, and was formally abolished by the Civil Procedure Acts, Repeal Act, 1879, 42-3 Vict. c. 59. In criminal proceedings even, it is but little used, but is formally kept alive by 33-4 Vict. c. 23. In *Hall v. Lanning*, 91 U. S. 160, Mr. Justice BRADLEY in delivering the opinion of the court said: "In most of the States legislative acts have been passed, called joint debtor acts, which, as a substitute for outlawry, provide that if process be issued against several joint debtors or partners, and served on one or more of them, and the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the States in which they are rendered. They are generally held to bind the common property of the joint debtors, as well as the separate property of those served with process, when such property is situated in the State, but not the separate property of those not served; and, whilst they are binding personally on the former, they are

regarded as either not personally binding at all, or only *prima facie* binding on the latter."

In this State, while there is no statute which in express terms goes to this extent, although by the Judiciary Act, cap. 13, sec. 17, partnership debts become joint and several on the decease of one of the partners; *Pearce v. Cooke*, 13 R. I. 184; yet, there is a statute which practically accomplishes the same result. We refer to the Judiciary Act, cap. 13, sec. 18, which provides as follows: "No judgment, without complete satisfaction, rendered against a part only of the defendants in any action upon a joint contract shall be a bar to any future action on said contract, for any unsatisfied balance due, against such of the defendants upon whom or whose estate the writ in the original action shall not have been served." It is clearly to be implied from this statute that service on a part only of the defendants in an action upon a joint contract is sufficient to give the court jurisdiction. And it is doubtless by reason of the existence of said statute, which appears in substantially the same form as early as the revision of 1844, that the settled practice in this State, in cases like the one now before us, has been to serve the writ upon such of the defendants as are within the jurisdiction thereof, and to proceed only against them for the breach of such contract. See *Winslow v. Brown*, 7 R. I. 95.

Moreover we see no reason why the return of *non est inventus* made by the sheriff in this case as to the defendant Samuel Adams, may not properly be treated as equivalent to the common law process of outlawry. The writ was properly sued out against both of the defendants and the return thereon shows that the plaintiff has done all that he could to bring them both into court; and having succeeded as to one of them it would seem that he ought to be allowed to proceed to obtain a judgment against him. See *Dillman v. Schultz*, Serg. & Rawle, 35; *Tappan v. Bruen*,⁹² 5 Mass.

92. In this case the court said: "It has been an immemorial practice, in the service of a writ sued on a contract against two or more defendants, if some of the defendants are without the jurisdiction of the commonwealth, * * * to cause the writ to be served on the defendants within the State, and to proceed only against them for the breach of the contract by all the defendants. * * * This practice originated from necessity, as no mode of service is provided by our laws upon a debtor without the State, who has no place of abode or property within it."

But in *McCall v. Price* (1821) 1 McCord (S. C.) 82, the majority of the court held that although this procedure would be substantially an equivalent of outlawry at common law, and although the plaintiff would be left entirely

193. But, however this may be, we are clearly of the opinion that under the statute above quoted and the uniform practice in this State, the case at bar may properly proceed against the defendant Spitz, upon whom only the writ was served. The demurrer is therefore sustained and the plea in abatement overruled.⁹³

without a remedy unless permitted to resort to such procedure, nevertheless such procedure was not authorized, and unless all joint obligors could be brought into court together there was no remedy against any of them.

93. *Exceptions to the rule that all joint obligors must be joined are stated by Dicey as follows:*

"Exception 1.—Where a co-contractor has become bankrupt."

"Exception 2.—Where a claim is barred against one or more joint debtors, and not against others."

"Exception 3.—Where a co-contractor is resident out of the jurisdiction."

[This is statutory, based on 3 and 4 W. 4, c. 42, sec. 8. See *Joll v. Lord Curzon* (1847) 4 C. B. 249.—Ed.]

"Exception 4.—Where an action is brought against common carriers."

[This also is based upon statute, — 11 Geo. IV; 1 Will. IV, c. 68, s. 5.—Ed.]

"Exception 5.—Where an action is brought against a firm, some of the members of which are nominal or dormant partners."

"Exception 6.—Where a co-contractor is an infant or a married woman."

Dicey on Parties, chap. XI.

Partners and Unincorporated Companies. This rule as to the joinder of all co-obligors applies to partnerships and unincorporated companies, and all the members must be joined as parties defendant, though one member must or may be sued alone on contracts made by him on behalf of the firm or company, in the same cases in which an agent must or may be sued on contracts made by him on behalf of his principal. Dicey on Parties, chap. XIII.

In case of the death of a joint obligor the liability passes to the survivor, and on the death of the last survivor to his representative. Dicey on Parties, 237. And since contracts made by partners and unincorporated companies are joint obligations of all the members, the same rule as to survivorship obtains. Dicey on Parties, 274.

The use of the process of outlawry to compel the appearance of a defendant, is thus described by Pollock and Maitland, 2 History of English Law, 591, 592:—"Where there was no specific thing that could be seized and adjudged to the plaintiff as being the very thing that he demanded, the law had at its command various engines for compelling the appearance of the defendant. Bracton has drawn up a scheme which in his eye is or should be the normal process of compulsion; but we can see both from his own text and from the plea rolls that he is aiming at generality and simplicity, and also that some questions are still open. The scheme is this: (1) Summons, (2) Attachment by pledges, (3) Attachment by better pledges, (4) *Habeas corpus*, (5) A distraint by all goods and chattels, which, however, consists in the mere ceremony of taking them into the king's hand, (6) A distraint by all goods and chattels such as to prevent the defendant from meddling with them, (7) A distraint by all goods and chattels which will mean a real seizure of them by the sheriff, who will become answerable for the proceeds (issues, *exitus*) to the king, (8) Exaction and outlawry.

"Bracton, however, has to argue for the use of outlawry. He has to suggest that there can be a minor outlawry just as there can be a minor excommunication, in other words, that a form of outlawry can be employed which will not involve a sentence of death. At a little later time a distinction is here drawn. In some of the forms of action, for example *Trespass vi et armis*, there can be arrest (*Capias ad respondendum*) and, failing this, there may be outlawry; in other forms 'distress infinite' is the last process. At a yet later stage, partly by statute, partly under the cover of fictions, *capias* and

outlawry became common to many forms, and 'imprisonment upon mesne process' was the weapon on which our law chiefly relied in its struggle with the contumacious."

WINSLOW v. HERRICK. ✓

Supreme Court of Michigan. 1861.

9 Michigan, 380.

CAMPBELL, J.: The suit below was brought on a replevin bond executed by Garret S. Swazie, as principal, and James R. Vleit, Jonathan H. Bescherer and Wilder Winslow, as sureties. All of the sureties were served. The bond was joint and several.

Vleit appeared and pleaded, and a default was entered against the other defendants served. When the case came on for trial, plaintiff discontinued as against Swazie and Vleit, and took judgment against Bescherer and Winslow. This is assigned as error.

We think the objection well taken. A party cannot, upon a joint and several demand, treat the demand as a joint obligation of less than all the debtors. It must be joint as to all, or several as to all. 1 *Pars. on Cont.* 12, 13. This is a well-settled and very familiar doctrine.

The rule authorizing a plaintiff to discontinue against one or more defendants was not designed to change any legal rights, but merely to enable a plaintiff who had sued more parties than he could recover against to amend his case by declaring against his real debtors. * * * It is very clear that the declaration before us does not set out a contract under which the plaintiffs in error were jointly liable without Swazie and Vleit, and had they been sued jointly without their co-obligors, they might have pleaded in abatement. Plaintiff could not, by the indirect process which he adopted, place them in any different position, or charge them in any way not justified by his declaration.

Some other questions were presented, but the view we have taken renders it unnecessary to decide them. The judgment must be reversed, with costs.

JOHNSON v. WELCH.

*Supreme Court of Appeals of West Virginia. 1896.**42 West Virginia, 18.*

ENGLISH, J.: This was an action of trespass on the case in *assumpsit*, brought by George S. Johnson and H. W. Foutz, doing business under the firm name and style of Johnson & Foutz, against I. A. Welch and Reuben Boggess, in the circuit court of Mercer county, in which the plaintiffs sought to recover the sum of one thousand, nine hundred and five dollars and twenty-five cents, for material furnished and labor expended by said plaintiffs at the instance and request of the defendants in building and erecting a certain church house near the mouth of Simmons Creek, in Mercer county, W. Va. The defendants demurred to the plaintiff's declaration. The demurrer was overruled. The defendants then pleaded non assumpsit, and issue was joined thereon. On the 26th day of November, 1894, the case was submitted to a jury, and resulted in a verdict for the defendants. The plaintiffs moved the court to set aside the verdict of the jury, and award them a new trial, and to arrest the judgment upon said verdict, which motion the court sustained, set aside the verdict, and awarded the plaintiffs a new trial, and the defendants excepted.

The contract upon which this suit is predicated reads as follows:

"Princeton, W. Va., Feb. 10, '87. To the Building Committee of the Baptist Church, Simmons Creek, Mercer County, West Va.: We propose to erect and finish a church building according to the accompanying specifications made by (H. W. Foutz) for the sum of seventeen hundred dollars. Johnson & Foutz. \$1,700."

"Bid accepted, at seventeen hundred dollars, to complete the church according to the accompanying specifications, and to do the stone work at \$3.50 per cubic yard. I. A. Welch. Reuben Boggess."

The defendants obtained this writ of error, and claim that the court erred in setting aside the verdict, and awarding the plaintiff a new trial.

The question for our determination is whether the verdict rendered by the jury is warranted by the law and the testimony. When we look to the paper itself upon which the suit is predicated, we find it is addressed to the "Building Committee of the Baptist Church, Simmons Creek, Mercer County, West Va.," by the plaintiffs, Johnson & Foutz. It was a formal bid for the construction of the church for the sum of one thousand and seven hundred dollars. They did not make the offer to build this church at the price named to any particular individuals, calling them by name, but the offer was made to the building committee of that church; and when the acceptance of that bid in writing to complete said church at that price according to the accompanying specifications was signed by I. A. Welch and Reuben Boggess, and the plaintiffs proceeded to build the church, they thereby recognized the defendants as the building committee to whom it was addressed, and the said Welch and Boggess acknowledged themselves to be the committee addressed by accepting said bid, over their signatures.

Under the title "Liability of Agents to Third Parties," p. 401, 1 Am. & Eng. Enc. Law, we find the law thus stated: "A duly authorized agent, acting in behalf of his principal, is not personally responsible on the contract when the third party knows that he acts in the name and on behalf of the principal." And in the footnote on same page it is said: "But the bare want of authority in an agent or trustee to bind the persons or estates for which he assumes to be acting does not render him individually liable where the facts and circumstances indicate that no such liability was intended by either of the parties." Applying this law to the facts of this case, it is apparent from the face of the paper itself that the proposition to erect the church for one thousand and seven hundred dollars was not addressed to I. A. Welch and Reuben Boggess either as individuals or as a building committee, but was addressed to the "Building Committee of the Baptist Church, Simmons Creek, Mercer County, West Va.;" and the plaintiffs concluded no contract with them as individuals when they accepted said bid, and said Welch and Boggess, in their individual capacity, could not have compelled a compliance with said bid, while as a building committee, recognized as such by the plaintiffs, they could have enforced compliance in accordance with the specifications attached. * * *

* * * * *

* * * Upon this point we find the law stated in *Meehem, Ag.*, in a note on page 386 (section 550) quoting from the opinion of ELLSWORTH, J., in the case of *Ogden v. Raymond*, 22 Conn. 379: "The authorities are somewhat conflicting as to the liability of an agent in actions *ex contractu*, but the weight of authority, we think, is that, to charge an agent in such action, the credit must have been given to him, or there must be an express contract, and, if there is a written contract, there must be apt words in it to charge him." See the case of *McCurdy v. Rogers*, 21 Wis. 199 (point 4 of Syllabus), where that court holds. "The agent is not in any case liable in an action *ex contractu*, unless the credit has been given to him, or he has expressly agreed to be liable, and, if there is a written contract, it must contain apt words to charge him."

* * * * *

For these reasons, my conclusion is that the court committed an error in setting aside the verdict of the jury, and the judgment complained of must be reversed, with costs and damages to the plaintiffs in error.⁹⁴

94. *The exceptions to the rule* that the principal alone, and not the agent, is to be sued on contracts made through an agent, are stated as follows in Dacey on Parties, chap. XII:

"Exception 1.—Where an agent contracts by deed in his own name."

"Exception 2.—Where an agent draws, indorses, or accepts a bill of exchange in his own name."

"Exception 3.—Where credit is given exclusively to the agent."

"Exception 4.—Where an agent contracts for persons incapable of contracting."

"Exception 5.—Where the contract is made by the agent himself, i. e., where the agent is treated as the actual party by whom the contract is made, or in other words, where the agent, though acting as such, incurs a personal responsibility."

"Exception 6.—Where the agent is the only known or ostensible principal, or where a contract (not under seal) has been made by an agent in his own name for an undisclosed principal."

"Exception 7.—Where money received by an agent for his principal has been paid under a mistake of fact, or obtained by means of a tort."

DAVIS v. MILLETT.

Supreme Judicial Court of Maine. 1852.

34 Maine, 429.

Assumpsit, for the price of a cooking stove.

It was admitted at the trial that the defendants were husband and wife, whereupon the judge ordered a nonsuit, and the plaintiff excepted.

APPLETON, J.: This is an action of assumpsit, for a cooking stove sold the defendants, who, it is conceded, were husband and wife. The sale, as it appears from the allegations in the writ, was made to them jointly. Whether, however, it was made to the wife alone, or to the husband and wife jointly, is immaterial, since the result must in either case be the same.

As a general rule, the wife, by the principles of the common law, cannot, during coverture, enter into any contracts, by which she can bind her own estate or that of her husband. 2 Bright, Husband & Wife, 5. Neither can she jointly contract with him. When acting as his agent, she may bind his estate but not her own. While such is conceded to be the doctrine of the common law, it is insisted that its provisions have been so modified by recent statutes as to allow the maintenance of this suit.

The common law remains in full and unimpaired vigor, unless it is changed by legislative enactment. The statute of 1848, c. 73, upon which the counsel for the plaintiff relies, is entitled "an Act in addition to an act to secure to married women their rights in property." The act referred to, and the preceding acts on the same subject, do not authorize a married woman to enter generally into contracts in her own behalf. Neither do they empower her to become a joint contractor with her husband. * * *

The contract set forth in the declaration is a joint contract. The wife cannot, by the common law or by any statute of this State, become a party to a contract of purchase jointly with her husband. Nor has she the general power so to contract as to bind the estate of her husband without his authority.

*Exceptions overruled. Nonsuit confirmed.*⁹⁵

95. *On contracts made by the wife alone during coverture*, the husband is to be sued alone, on the ground that the wife acted as his agent and the contract is his contract. In *Waithman v. Wakefield* (1807) 1 Campb. 120, Lord Ellenborough said: "Where a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value. If they are not cohabiting, then he is, in general, only liable for such necessities as from his situation in life it is his duty to supply her."

On contracts made by the wife before marriage, both are to be joined. "The propriety of joining the husband as a defendant with the wife in actions *ex contractu*, when the cause of action originated with the wife *dum sola*, is obvious; because, as the law makes him liable during the coverture for the fulfilment of all her engagements made anterior thereto, it would be repugnant to the first principles of natural justice that he should be con-

demned, or have a judgment rendered against him without an opportunity afforded of being first heard. But still in such suit the contract, or foundation of it, must appear to have originated with the wife alone while sole. And as the husband is only liable for such cause of action *during the coverture*, it follows necessarily that the moment that the tie is severed, either by the death of the wife or by the death of the husband, all liability of the husband, or of his estate, in that action ceases; if the wife, however, should happen to be the one that survives, the action survives also against her, and may be prosecuted to judgment and execution." *Nutz v. Reutter* (1832) 1 Watts (Pa.) 233.

McKAY v. ROYAL.

Supreme Court of North Carolina. 1860.

7 Jones Law, 426.

Action of assumpsit, tried before SHEPHERD, J., at the last spring term of Sampson Superior Court.

The plaintiffs, who are attorneys at law, and professional copartners, appeared as counsel for Catharine Royal, who propounded the will of her husband, Rozen Royal, for probate, wherein she was named executrix, and they also acted as counsel for her generally, in the management of the estate. After the rendition of these services, the plaintiffs demanded payment, which the defendant refused, whereupon this suit was brought against her individually, without declaring against her as executrix. The counsel for the defendant asked the court to instruct the jury that as no express promise was made by defendant to pay this demand, the plaintiffs could not recover.

His Honor refused the instruction, and defendant excepted.

Verdict for plaintiffs. Judgment and appeal.

BATTLE, J.: There is not the slightest foundation for the defense attempted to be set up by the defendant. As the plaintiffs were employed by the executrix to advise and assist her in the probate of the will of the testator, and in the management of his estate, she became liable to them upon a *quantum meruit* in her individual, and not in her official capacity. Their claim against her could not be a debt of the testator, for, say the court, in *Hailey v. Wheeler*, 4 Jones' Rep. 159, "it is not possible to conceive how a debt of the testator can be created by matter occurring wholly in the executor's time. If an executor makes an ex-

press contract in reference to the property of the estate, as, if he employ one to cry the sale of the property, as auctioneer, this is not a debt of the testator." So, in the present case, the executrix having employed the plaintiffs as her attorneys and counselors, though in relation to the business of the estate of her testator, the debt is hers, and she must pay it, and if the disbursement be a proper one, she will be allowed a credit for it in the settlement of her account with the estate. This is common learning, and it is unnecessary to enlarge upon it, or cite any other authority in support of it.

*Judgment affirmed.*⁹⁶

96. *This rule differs from the rule as to plaintiffs*, for an executor or administrator may sue in either his personal or his representative character upon all contracts made by him as representative after the death of the deceased. See note on page 764, *supra*.

In most other respects the rules are the same for both plaintiffs and defendants. Thus Rule 41, together with the 2nd and 4th exceptions to it and the two subordinate rules thereunder, Rule 42, 1, quoted from Dacey on Parties, given on page 764, *supra*, are all applicable to defendants by simply introducing the necessary changes in wording to make them apply to defendants.

SECTION 4. PLAINTIFFS IN ACTIONS IN TORT.

ROBERT MARYS'S CASE.

Court of King's Bench. 1613.

9 Coke, 111 b.

[The plaintiff, Edward Crogate, brought an action against Robert Marys, and alleged that he was a copyholder of a certain parcel of land and as such had a right of common of pasture in certain adjoining land called Town-Barningham Common, and that the defendant unlawfully put his beasts into this common and pastured the herbage, to the injury of the plaintiff. To which the defendant pleaded not guilty. And the jury found among other things that as to depasturing the herbage defendant was guilty. And upon the question of his right to sue for such depasturing the court said: —]⁹⁷

97. Condensed statement of facts by the editor.

* * * 3. For every feeding by the cattle of a stranger, the commoner shall not have an assise nor an action on the case, as his case is, but the feeding ought to be such *per quod* the commoner, etc., common of pasture, etc., for his cattle, etc., *habere non potuit, sed proficuum suum inde per totum id' tempus amisit*, etc. So that if the trespass be so small, that he had not any loss, but sufficient in ample manner remains for him, the commoner shall not take them damage feasant, nor by any action for it; but the tenant of the land may in such case have an action. And therefore, if my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a *per quod*, viz. *per quod servitium, etc., amisit*; so that the original act is not the cause of his action, but the consequent upon it, viz., the loss of his service is the cause of his action; for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action. So in the case at bar, the lord of the soil shall have an action for trespass done in the waste or common, as an immediate trespass to him, be it greater or less, but the commoner shall not have an action but by consequence, viz., if the trespass be such, *per quod proficuum communiae suae, etc., amisit*, or that he could not have his common in so beneficial manner as he had before.⁹⁸ * * *

98. The doctrine here suggested is of very wide application. Dicey states the rules in general terms as follows: "Rule 78.—No one can bring an action for any injury which is not an injury to himself. Rule 79.—The person who sustains the injury is the person to bring an action for the injury against the wrongdoer."

Under these rules he states the following subordinate rules:

"Subordinate Rule I.—The person to sue for any interference with the immediate enjoyment or possession of land or other real property is the person who has possession of it, and no one can sue merely for such an interference who has not possession."

"Subordinate Rule II.—For any permanent injury to the value of land, or other real property, i. e., for any act which interferes with the future enjoyment of, or title to, the land, an action may be brought by the person entitled to a future estate in it, i. e., by the reversioner."

"Subordinate Rule III.—Any person may sue for an interference with the possession of goods, who, as against the defendant, has a right to the immediate possession of such goods; and no person can sue for what is merely such an interference who has not a right to the immediate possession of the goods."

"Subordinate Rule IV.—Any person entitled to the reversionary interest in goods (i. e., the reversioner) may bring an action for any damage to such interest, or, in other words, to his right of ultimate possession." Dicey on Parties, chap. XIX.

RHOADS v. BOOTH. ✓

*Supreme Court of Iowa. 1863.**14 Iowa, 575.*

WRIGHT, J.: Upon the information of defendant the plaintiffs in this action (three in number, but not partners), were arrested, tried before a justice of the peace for larceny and after due examination were discharged. They thereupon instituted this action to recover damages for an alleged malicious prosecution. On the trial, defendant, among others, ~~asked these instructions~~:

1st. The damages in the case, if any, are purely personal, that is, they appertain to each person separately, and unless some cointerest or joint interest is shown, plaintiff cannot recover.

2nd. If a man commit a trespass and kill a horse, which belongs to A and B jointly, then they can sue and recover in a joint action. But if he, by the same act, kills two horses, one belonging to A and the other to B, they could not, in a joint action, recover the value of the horses. So in this action plaintiffs can only recover such damages as they have jointly sustained.

By these and other instructions of a like import, defendant claims the rule to be, that plaintiffs could not maintain this action unless they had a joint interest in the damages claimed, or the judgment to be recovered. These were all refused, and such refusal is now assigned for error.

The instructions should have been given. As a rule it is only when two or more persons are jointly entitled to, or have a joint interest in, the property affected, or the damages to be recovered, that they can unite in an action. Therefore several parties cannot sue jointly for injuries to the person, as for slander, a battery, or for false imprisonment. For words spoken of parties in their joint trade, or for slander of title, they may sue jointly; but not so when two or more sue for slanderous words, which though spoken of all, apply to them all separately; or in a case of false imprisonment, or a malicious prosecution, when each, as individuals, are imprisoned or prosecuted. The principle underlying is, that it is not the act but the consequence

which is looked at. Thus, if two persons are injured by the same stroke, the act is one, but it is the consequence of the act, and not the act itself, which is redressed, and therefore the injury is several. There cannot be a joint action, because one does not share in the suffering of the other. 1 Ch. Pl. 64; 2 Saunders, 116, 117; 2 Bouv. Inst., p. 171.

* * * * *

*Reversed.*⁹⁹

99. "Rule 80.—1. Persons who have a separate interest and sustain a separate damage must sue separately.

"2. Persons who have a separate interest, but sustain a joint damage, may sue either jointly or separately in respect thereof.

"3. Persons who have a joint interest must sue jointly for an injury to it." Dicey on Parties, 380.

"Rule 82.—Where several persons have a joint right of action for a tort it passes on the death of each to the survivors, and on the death of the last (if the right of action be one that survives) to his representatives." Dicey on Parties, 382.

Partners and Unincorporated Companies. Since the firm or company is nothing but the individuals who compose it, the general rules as to joinder of plaintiffs apply.

"Rule 84.—All the partners in a firm, or members of an unincorporated company, should join in an action for wrong done to the firm or company." Dicey on Parties, 384.

HART v. CROW.

✓ 6770

Supreme Court of Indiana. 1845.

7 Blackford, 351.

SULLIVAN, J.: This was an action on the case by Crow and wife against Hart for a libel on the plaintiffs, written and posted up by defendant in a place of public resort. The declaration alleges that the defendant, wickedly and maliciously intending to injure the plaintiffs in their good name, etc., and to cause it to be believed by their neighbors and others that they had been and were guilty of the crimes of lying and stealing, and to subject them to the scorn of their neighbors, etc., did, on, etc., at, etc., falsely, wickedly and maliciously, compose and publish, of and concerning the plaintiffs, a certain false, scandalous, malicious and defamatory libel, etc. The alleged libel is then set out, and charges that John Crow and his wife are liars, rogues, etc. By means whereof the plaintiffs have been greatly injured,

etc. Demurrer to the declaration overruled, and joint damages assessed upon a writ of inquiry.

There are some questions raised on the admissibility of certain testimony that was objected to on the execution of the writ of inquiry, but the case does not require that we should decide them. The court erred in overruling the demurrer to the declaration. The suit is brought not only for the injury sustained by the wife, but for the wrong done to the husband also. The action is joint, and joint damages are sought to be recovered. Two separate causes of action are shown, accruing to different persons, that cannot be united in the same suit. For the injury done to the wife, the husband must join in the suit; but the declaration must show that it is for the wrong done to the wife that the suit is prosecuted. For the injury done to the husband, he alone should sue. (1) In *Newton et ux. v. Hatter*, 2 Ld. Raym. 1208, the suit was brought for a battery committed on both. There was a judgment by default, and a writ of inquiry was executed. On the return of the writ, judgment was arrested because the wife could not be joined in an action with the husband for a battery on the latter. If the defendant had pleaded to the declaration, and the cause had gone to a jury, and separate damages had been given for the injury to the wife, it may be that the verdict might have been sustained. Bull. N. P. 21; Cro. Jac. 655; 3 Binney, 555.

PER CURIAM. *The judgment is reversed with costs. Cause remanded, etc.*

SMITH v. FITZGERALD.

Supreme Court of Vermont. 1887.

59 Vermont, 451.

WALKER, J.: This is an action *quare clausum fregit* for cutting trees on land of which the plaintiff and his wife, Laura, were in possession in right of the wife, who held the same under a warranty deed from her father, and over which the plaintiff exercised such control and management as a husband may, in the law, exercise over the wife's real estate, and had no right or estate in the premises except

such as a husband acquires by marriage in the real estate of his wife. The wife was not joined as a party plaintiff in the writ. * * *

* * * * *

II. The next question to be considered is whether an action can be maintained in the name of the husband alone against a person for cutting trees upon the wife's land during the coverture.

As we have no statute law upon this subject the question must necessarily be determined upon the principles and authority of the common law.

The common law rule as to the joinder of husband and wife in actions for damages to the real property of the latter during coverture is said by some writers to be not quite clear. The rule, however, seems to be quite uniform in the elementary books and decisions of the courts.

In Chitty's Pleading, vol. 1 (6th Am. Ed.), page 85, the law is stated as follows: "In real actions for the recovery of the land of the wife, and in a writ of waste thereto, the husband and wife *must* join. But when the action is merely for the recovery of damages to the land or other real property of the wife during the coverture * * * the husband may sue alone or the wife may be joined, her interest in the land being stated in the declaration."

In Waterman on Trespass, vol. 2, s. 937, the rule is stated as follows: "At common law, where the action is merely for the recovery of damages done to the real estate of the wife during coverture, the husband may sue alone, or his wife may be joined."

In Dicey on Parties to Actions, 412, the rule is laid down as follows: "A husband may sue either alone, or jointly with his wife, for all injuries done during coverture to real property, of which the husband and wife are seized, or to which they are entitled in right of the wife."

The same doctrine is asserted in Hilliard on Torts, vol. 2, page 502. It is there stated that an action for trespass for cutting trees on land held by husband and wife in right of the wife, may be brought by the husband alone, or by the husband and wife jointly, at his election.

The rule thus laid down seems to have been followed in the decisions of the courts where the common law governs and is supported by an unbroken line of authority. 2 Saunders Pl. & Ev. 81; 1 Roll. 348; 2 Vent. 195; Com. Dig.

tit. Baron & Femme, V. W. & X.; 2 Bac. Abr. tit. Baron & Femme (K.); Cro. Car. 347; 1 W. Saunders, 291; Selwyn N. P. 310; *Bidgood v. Way*, 2 Black. 1236; *Weller v. Baker*, 2 Wils. 423; *Clapp v. Stoughton*, 10 Pick. 469. *Allen et ux. v. Kingsbury*, 16 Pick. 235; *Tallmadge v. Grannis*, 20 Conn. 296; *Fairchild v. Chaustelleux*, 1 Pa. 176; *Ib.* 8 Watts, 412.

* * * * *

The principle deduced from the cases cited, and upon which the decisions are based, is, that in all cases for injuries done to the wife's land during coverture, where the right of action will survive to the wife upon the death of the husband, and to the husband upon the death of the wife, the husband may sue alone or join with his wife at his election; and that the wife must be joined only in those cases where the right of action will survive to the wife alone and not to the husband; such as actions to recover the title to the land and actions brought to recover for waste only.

It is well settled that an action of trespass for injuries committed to the wife's land during the coverture will survive to the husband on the death of the wife, and that if the wife survive any action for a tort committed to her real estate during the coverture will survive to her. 1 Chitty Pl. 85.

It must therefore be held in this case that the action was properly brought in the name of the husband alone.

* * * * *

We find no error in the judgment of the court below, and the same is *affirmed*.

FAIRCHILD v. CHAUSTELLEUX.

Supreme Court of Pennsylvania. 1839.

8 Watts, 412.

ROGERS, J.: The only point on which the plaintiff in error relies, is raised on the charge of the court, that husband and wife can sustain an action of replevin for timber, cut and carried away from property belonging to them during the coverture. It is a principle of law, stated by Chitty in his treatise on Civil Pleading, and since recognized

in *Seibert v. McHenry*, 6 Watts, 301, that when a *feme covert* has no interest whatever in the subject-matter of the action, and consequently ought not to be made a party, and she sues either with or without her husband, the plaintiff will be nonsuited, on the general issue. On the trial, the defendant prayed the court to instruct the jury that the husband and wife could not join in the suit, but that suit should be brought in the name of the husband alone. The court refused to give this direction, and of this the defendants complain. The plaintiff contends, that because the freehold, on which the trespass was committed, was the joint property of the husband and wife, the action is well brought in their joint names. To this the defendants answer, that the suit is not brought for an injury to the freehold, but that the action is brought for an injury to the personal property of the husband. Where trespass is committed on the lands of the wife during coverture, the husband may sue alone in trespass, or according to the current of authorities, the wife may be joined. *Clapp v. Slaughter*, 10 Pick. 469; Com. Dig. tit. Baron & Feme. Whether this principle applies to the somewhat anomalous interests of the husband and wife in the *locus in quo*, it is unnecessary to decide, although the principle is undoubtedly applicable to a wrongdoer to the freehold of a wife, when the action is trespass *quare clausum fregit*. But here the parties have not thought proper to adopt that remedy for the injury, but have resorted to an action for the thing itself. By the act of severance from the freehold, whether done by the husband himself, or a wrongdoer, the timber becomes personal property, and *eo instanti* vests in the husband. The action is therefore for taking and carrying away the property of the husband, in which the wife cannot be joined. The wife can acquire no personal property in her own right, and if she obtains any, either by gift or otherwise, it becomes immediately the property of the husband, though not in his actual possession. But the property was in the constructive, if not in the actual possession of the husband from the time of the severance, and the subsequent asportation was a wrong done to that possession, for which an action well lies in his name, and in his name alone. The injury is done to him, and the wife has no interest whatever in the subject-matter of the action, although she was a joint owner with her husband of the freehold, from which the timber was

severed. In *Nethart and Wife v. Anderson*, 1 Salk. 114, trover was brought by *baron and feme*, and the plaintiff declared *quod cum possessionat fuerunt*, etc., the defendant converted *ad damnum ipsorum*, held nought after verdict; for the possession of the wife is the possession of the husband, and so is the property; so that the conversion cannot be to the damage of the wife, but of the husband only. The same doctrine held in trespass for taking goods. 1 Salk. 115. So baron must bring an action alone for work done by the wife during the coverture, unless there be an express promise to the wife. *Buckley v. Collins*, 1 Salk. 115. And one of the reasons given for the judgment of the court is, that the advantage of the wife's work shall not survive to the wife, but goes to the executor of the husband. This reason applies to this case, for had the baron died after the severance of the timber, the property would not have survived to the wife, but would have gone to the executors of the husband; for, by the severance, it becomes the property of the husband. There are some causes of action accruing through the means of the wife, for which the husband must sue alone; while there are others for which he may join his wife with him in a suit, or sue alone, as he pleases. And the criterion by which it may be judged when he must sue alone, and when he may or may not, seems to be this: if the cause of action will survive to the wife, then the husband may join his wife in the action for the recovery of it, or sue alone; but if it will not survive, then the husband must sue alone. *Clancy's Husband and Wife*, 7, and the authorities there cited. * * *

Judgment reversed.

KENT v. BOTHWELL.

Supreme Judicial Court of Massachusetts. 1890.

152 Massachusetts, 341.

Replevin, brought by the administratrix of the estate of Nicholas Kent, in her own name, against a deputy sheriff. Trial in the superior court, before DEWEY, J., who allowed a bill of exceptions, in substance as follows:

The defendant, on July 3, 1889, attached and took the property in question upon a writ, as the property of one White. The plaintiff, who was appointed administratrix on June 5, 1888, contended, and offered evidence tending to prove, that the property when attached by the defendant belonged to the estate, and the title to the same was in her as such administratrix; and that she was entitled to maintain the action in her own name. The defendant asked the judge to rule that the plaintiff could not maintain the action by virtue of the title which vested in her as administratrix. The judge refused so to rule, and ordered a verdict for the plaintiff; and the defendant alleged exceptions.

KNOWLTON, J.: To maintain an action of replevin for goods, the plaintiff must prove his general or special property in them, and a right to immediate possession.

Upon causes of action which accrued in the lifetime of the testator or intestate, an executor or administrator must sue in his representative capacity, but in general, upon those founded on transactions with him, or on injuries to property occurring after his appointment, he may sue in his own name. The fact that he is accountable for the proceeds of the suit as assets of the estate does not necessarily preclude him from maintaining an action without reference to his official relation. The rule has generally been stated to be, that, for injuries to property committed after the death of the intestate, an administrator may, and properly should, sue as an individual; but if he chooses to make his claim in his official capacity the action will lie. 2 Greenl. Ev. Par. 338; *Carlisle v. Burley*, 3 Greenl. 250; *Foster v. Gorton*, 5 Pick. 185; *Bollard v. Spencer*, 7 T. R. 358; *Knox v. Bigelow*, 15 Wis. 415. It has sometimes been held, that to maintain trover in his own name the administrator must have had actual possession, but the great weight of authority is now otherwise, the action being made to rest on his right of property, which draws after it the right of possession. *Bollard v. Spencer*, 7 T. R. 358; *Hollis v. Smith*, 10 East, 293; *Gray v. Swain*, 2 Hawks. 15; *Carter v. Estes*, 11 Rich. (S. C.) 363; *Kerby v. Quinn*, Rice (S. C.), 264.

Upon an appointment of an administrator, the property of his intestate immediately passes to him by relation from the time of his intestate's decease. While he holds *en autre droit*, he has the legal title, and may at any time make an absolute disposition of the property for which he

is accountable on his official bond. He holds both the possession and the property as an individual, although he holds them under a kind of trust. An unlawful interference with the property to its damage is a disturbance of his possession for which he may sue in his own name, although under his trust he is accountable for the damages recovered. In like manner, it should be held, when a plaintiff must establish a title, that an administrator's right to the chattels of the intestate is a sufficient property for the maintenance of an action.

None of the cases which have been brought to our attention refer to any distinction between replevin and actions for injuries to property, in reference to an administrator's right to sue in his own name; and his right so to bring a suit in replevin has been sustained by direct adjudication in New York and in Florida. *People v. Judges of Mayor's Court*, 9 Wend. 486; *Patchen v. Wilson*, 4 Hill (N. Y.), 57; *Branch v. Branch*, 6 Fla. 314.

The property of the plaintiff, as administratrix, was sufficient to enable her to maintain her action; and the ruling at the trial was correct.

Exceptions overruled.¹

1. *General Rules as to Executors and Administrators.*

"Rule 92.—The personal representative of the deceased (i. e., his executors and administrators) can sue for injuries to the property of the deceased done during his lifetime."

"The right to sue for injuries to the testator's or intestate's personal estate depends upon 4 Edw. III, c. 2 (extended by 15 Edw. III, c. 5)." "The right to sue for injuries done to the real estate of the deceased in his lifetime depends on 3 and 4 Will. IV, c. 42, s. 2."

"Rule 93.—The personal representatives of the deceased cannot sue for injuries to the person, feelings or reputation of the deceased."

"The rule that an action for a personal wrong dies with the person, still applies to those wrongs which are of a strictly personal character."

"Rule 94.—The personal representatives of the deceased can sue for injuries to his personal property committed after his death."

"Rule 95.—The real representative of the deceased cannot sue for any wrong done to him."

"The right to sue passes, if it passes at all, to a deceased person's personal, and not to his real representative; nor can the latter sue for injury done to his property after death." *Dicey on Parties*, chap. XXIV.

SECTION 5. DEFENDANTS IN ACTIONS IN TORT.

LOW v. MUMFORD.

*Supreme Court of New York. 1817.**14 Johnson, 426.*

The plaintiff in error brought an action in the court below, against the defendant in error, "for keeping up a mill-dam on the Susquehannah river, below the lands of the plaintiff, whereby the water of the river was set back, and flowed the plaintiff's land," etc. The defendants pleaded in abatement, that the land on which the milldam was erected, and the mills appurtenant thereto, were held in joint tenancy by the defendants, together with several other persons (naming them) who were not made parties to the suit. The plaintiff objected to the sufficiency of the plea, but the justice gave judgment for the defendants.

PLATT, J., delivered the opinion of the court. The general rule on this subject is, that if several persons jointly commit a *tort*, the plaintiff has his election to sue all, or any of them, because a *tort* is, in its nature, a separate act of each individual, and, therefore, in actions, in form *ex delicto*, such as trespass, trover, or case for malfeasance, against one only, for a *tort* committed by several he cannot plead the nonjoinder of the others, in abatement or in bar. (1 Chitty's Plead. 75.) There is a distinction, however, in some cases between mere personal actions of *tort*, and such as concern real property. (1 Chitty. Plead. 76.) In the case of *Mitchell v. Tarbutt* (5 Term. Rep. 65), Lord KENYON recognizes this distinction, and says, "where there is any dispute about the title to land, all the parties must be brought before the court." A case in the year books (7 Hen. IV, 8) shows that a plea in abatement may be well pleaded for this cause, to an action on the case, for a *tort*. An action of trespass on the case was brought against the abbot of Stratford, and the plaintiff counted that the defendant held certain land, by reason whereof he ought to repair a wall on the bank of the Thames; that the plaintiff had lands adjoining, and that for default of repairing the wall, his meadows were drowned. To which Skrene said, "it

may be that the abbot had nothing in the land, by cause whereof he should be charged, but jointly with others, in which case the one cannot answer without the other."

But in actions for torts relating to lands of the defendants, there seems to be ground for this further distinction viz., between nuisances arising from acts of malfeasance, and those which arise from mere omission, or nonfeasance. The case of the abbot of Stratford was that of a nuisance, arising from neglect of duty in not repairing a wall, which was by law enjoined on the proprietor or proprietors of the land on which the wall stood. The *gist* of the action, therefore, was, that the defendant was such proprietor, and had neglected a duty incident to his title. The title to the land, on which the nuisance existed, was, therefore, directly in question; for if the abbot was not the owner of the land, he was not chargeable with neglect, nor liable for the nuisance. But in this case, the action is for a nuisance arising from an act of misfeasance, the "keeping up a milldam on a stream below the plaintiff's land." Here needs no averment that the defendant owned the land on which the dam was kept up. The title to that land cannot come in question in this suit, for the maintaining such a dam is equally a nuisance, and the defendants are equally liable for damages, whether the defendants own the land as joint tenants with others, or whether they are sole proprietors, or whether they have any right whatever in it." "*Keeping up*" the dam implies a positive act of the defendants; it is a malfeasance, and therefore, the plaintiff has a right of action against all or any of the parties who keep up that dam. Unless the title comes in question, there is no difference, in this respect, in cases arising *ex delicto*, between actions merely personal, and those which concern the realty. The plaintiff in such an action is always bound to join his cotenants, because his title must come in question as the foundation of his claim; but he may sue any or all who have done the tortious act. The justice, therefore, erred in deciding against the demurrer to the plea in abatement, and the judgment must be reversed.

*Judgment reversed.*²

2. Partners and Members of Unincorporated Societies.

"Rule 104.—One, or any, or all of the partners in a firm, or members of an unincorporated company, may be sued jointly for a wrong committed by the firm or company." Dacey on *Parties*, 467.

LARKINS v. ECKWURZEL.

*Supreme Court of Alabama. 1868.**42 Alabama, 322.*

This was an action for conversion of chattels brought by appellee against appellants. * * *

The court below charged the jury: "That if they believed from the evidence, that the goods were the property of the plaintiff, and were wrongfully taken by the defendant Moore, without the knowledge, authority, or consent of the plaintiff, and were afterwards sold by the defendant Moore, to the defendant Larkins, without the knowledge, authority, or consent of the plaintiff, and if this occurred before the commencement of the suit, the defendants were jointly liable to the plaintiff."

* * * * *

The jury rendered a verdict against both the defendants, on which judgment was rendered for \$1,332; from which they appealed, and assign for error the charges given as above.

BYRD, J.: The main question in this case is, whether upon the facts shown by the record, the action is maintainable against the appellants *jointly*. There can be no doubt that under the law and the facts in evidence, that the appellants are severally liable in trover. *Lee v. Matthews*, 10 Ala. 682; *Conner & Johnson v. Allen & Reynolds*, 33 ib. 516. No case has been found by us, none brought to our notice by counsel, in which a joint action in trover has been brought against the seller and buyer of a chattel, where the latter was a purchaser *bona fide*.

In the elementary works, no reference is made to the joint liability in trover of a seller and buyer, to the owner of a chattel. The reference made to the joint liability of parties in this form of action, are uniformly if not universally, to parties who participated, in some way, in the original conversion. In this case, when Moore took possession of the goods, under the evidence, he was liable for the conversion to the owner, and so would all persons who participated in that act have been, severally or jointly, liable with him, whether they knew or had notice of the claim of the owner

or not. But as to the joint liability of the original *tortfeasor* and a person to whom he sold the goods without any notice of the claim of the owner, the question is more difficult of solution.

The absence of any case in point, and the failure of the elementary writers to make any reference to such a case, may be looked upon as persuasive to show that in the opinion of the profession, such an action is not maintainable. Upon principle, it would seem unjust to subject a *bona fide* purchaser from a *tortfeasor*, to a joint suit with him, to the costs and damages which may be recovered in such an action, and to have them fixed upon him as a joint liability with his vendor.

* * * * *

BYRD, J.: We have carefully examined the record, the application for a rehearing, and the foregoing opinion; and, in response to the application, we have come to the conclusion to adhere to that opinion. In the case of *White v. Demary et al.*, 2 N. H. 546 (see, also, *Powery v. Sawyer*, 46 Maine, 160; *Moody v. Whitney*, 34 ib. 563; *Drake v. Barrymore*, 14 John. 166; 2 Scam. 448; 2 Hill on Torts, 467, Par. 26; *Laymon v. Hendrix*, 1 Ala. 212); the court say, "when an action sounds in tort, and is against more than one person, judgment cannot be had against more than one, without evidence of a joint wrong. A separate wrong by each, entitles the sufferer to only a separate action against each." And the court further says that had the action been *ex contractu*, a neglect of one would have subjected both. "But being *ex delicto*, the defendants to be all liable, must all have actually perpetrated the wrong, or directed it to be done." The facts of that case are not identical with those of this, but sufficiently so for the application of the principles announced, to the facts of this case.

And in *Hilliard on Torts*, it is said that a person who knowingly receives from another a chattel, which the latter has wrongfully seized, and afterward, on demand refused to give it back to the owner, does not thereby become a *joint trespasser*, unless the chattel was seized for his use. "So where A. took and converted the mule of plaintiff and sold it to B.", it was held that the original taking by A. and the detention by B. were separate causes of action. P. 448.

But it has been held that where a consignee, with power to sell, sells with intent to defraud the consignor, which

intent is known to the purchaser, the seller and buyer are jointly liable in trover. *White v. Wall*, 40 Maine, 574. Which is consistent with the doctrine held by us in the opinion heretofore delivered in this case. And these cases, with those cited heretofore, clearly draw the line of distinction which runs between those cases in which a joint action in trover lies against a buyer and seller, and those in which it does not. In trover against several defendants, all cannot be found guilty on the same count, without proof of a joint conversion by all. And if they all join in an act with the intent to deprive the owner of property, or to convert it to the use of one or both, they are jointly liable, whether the act be one of sale and purchase, or of any other character. But the sale by one who has converted the property of another, to an innocent purchaser, cannot sustain a joint action, in form *ex delicto*, against the seller and buyer.

Although all the evidence is not set out, yet enough is set out to show that the charge is erroneous. *Lackett v. McCord*, 23 Ala. 851; *Moore v. Clay*, 24 Ala. 235; *Hines et ux. v. Trautham*, 27 Ala. 359.³

3. A few torts such as slander and perhaps seduction, cannot be the act of more than one person. Thus, in *Coryton v. Lithebye* (1682) 2 Wms. Saund. 117 c., it was said that "one action will not lie against several persons for speaking the same words, as where a man brought an action against two for saying 'thou hast stolen plate, * * * and we do arrest thee for that felony,' and, there being a verdict for the defendant, it was moved in arrest of judgment, that the action does not lie against two jointly, because the words of one are not the words of the other, * * * and so it was resolved by the court, for these several causes can no more produce a joint action than their words and tongues can be said to be one."

"Rule 100.—Each wrongdoer's separate liability to be sued for a tort passes on his death (if it survives at all) to his personal representatives. The joint liability of several wrongdoers passes on the death of each to the survivors." Dicey on Parties, 439.

MADDOX v. BROWN.

Supreme Judicial Court of Maine. 1880.

71 Maine, 432.

APPLETON, C. J.: The defendant's son, a minor of the age of seventeen years, took his father's horse and carriage, which he had been allowed to use without restriction, and

drove to a store for the purpose of depositing money, which as treasurer of a Sabbath school, he had received the day before. Entering the store to make the deposit, he left his horse unfastened and unattended, and the horse so left started, and running away, the defendant's carriage collided with the plaintiff's team and occasioned an injury, to recover compensation for which this action is brought.

The horse and carriage were taken by the son in the absence of the defendant, and without his knowledge.

It is not pretended that the son was an unfit person to be entrusted with the use of the horse, or that the horse was unsafe or unsuitable. The plaintiff claims to recover, not on the ground of the parental and filial relation, but because the son in the management of the defendant's team was his servant, and engaged in his business, and that the defendant was liable for his negligence.

The master is liable to third persons for all damages resulting from the negligence of his servants, acting under his orders, or in the course of his business. Specific directions are not required. It is sufficient if the act was one within the range of the servant's employment. The general rule, as judicially declared in England, is that the master is answerable for every wrong of his servant committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. Wharton on Negligence, Par. 161; *Mitchell v. Crassweller*, 76 Eng. C. L. 236.

A master is not liable for his servant's torts when not in his employ. If a master gives his servant liberty for a day to go to a fair and to take his horse and wagon, he is not liable to third persons for an injury done by the servant during the day with his horse and wagon. *Bard v. Yohn*, 26 Penn. 482. The owner of a horse and carriage is not liable for an injury caused by the negligent driving of a borrower, to a third person, if not being used at the time in the owner's business. *Herlihy v. Smith*, 116 Mass. 265. So in *Sheridan v. Chadwick*, 4 Daly, 338, a coachman, after having used his master's horse and carriage in going upon an errand for his master, instead of taking them to the stable, used them in going upon an errand of his own, without his master's knowledge or consent, and, while so doing, negligently ran into and injured the plaintiff's horse; it was held that the master was not liable. If a servant

does a wrongful or negligent act without the authority, and not for the purpose of executing the orders or doing the work of his master, the latter is not responsible in damages therefor. *Howe v. Newmarch*, 12 Allen, 49.

The relation of master and servant must exist at the time of the injury.

It cannot be pretended, that, under the circumstances stated, the boy was engaged in the business of his father or acting for him. The jury could not have drawn the inference that he was so engaged or was so acting. It would have been unauthorized from the evidence.

The instructions given were correct, and those requested, so far as proper and applicable, were given.

Exceptions overruled.

MAYER v. THOMPSON-HUTCHISON BUILDING
COMPANY.

Supreme Court of Alabama. 1894.

104 Alabama, 611.

COLEMAN, J.: The Thompson-Hutchison Building Co., a corporation, contracted to erect a brick building in the city of Birmingham. Thompson, a corporator and president of the corporation, as its agent and officer, controlled and directed the workmen in its construction. A brick, either without the application of force, or by force, fell from the top of the wall, which, in falling, struck the plaintiff below on the head, and greatly injured him. Thompson was not present when the injury occurred, and was not otherwise liable than as an agent or officer of the company in charge. The first count of the complaint charges, that the defendants "did erect and build a certain building * * * in so careless, negligent and improper a manner, that by reason thereof certain brick fell from said building," etc. In the second count it is charged that the defendants "did erect and build a certain four-story brick building, * * * to the height of sixty feet, without any scaffold barrier and safeguard, to protect persons, * * * from brick falling from said building, when it was their duty to do so" etc.

The corporation and Thompson and the other corporators were jointly sued. The jury, under the instruction of the court, returned a verdict against the corporation and in favor of Thompson. This statement of the case we deem sufficient, to bring up the material questions involved.

* * * * *

The second count charges the defendants with neglect in their failure or omission to erect scaffolds or guards, so as to prevent brick from falling to the ground. On this proposition the defendant, Thompson, invokes the doctrine that an agent or servant is not liable for a mere omission or nonfeasance. The rule is stated as as contended for in Story on Agency, Par. 308, and in Story on Contracts, Par. 171; and there are numerous decisions which fully sustain the text. There are courts of high authority which hold differently. Our attention has not been called to any decision of the question in this State, and in declaring the law which shall govern, we have carefully considered both lines of decisions.

The principle upon which the rule is founded, as declared by Story, is, that there is no privity between the servant or agent and third persons, but the privity exists only between him and the master or principal. This relation of privity is that from which arises the maxim *respondeat superior*. The liability of the principal or master to third persons does not depend upon any privity between him and such third persons. It is the privity between the master and servant that creates the liability of the master for injuries sustained by third persons on account of the misfeasance and nonfeasance of the servant or agent. It is difficult to apply the same principles which govern in matters of contract between an agent and third persons to the torts of an agent which inflict injury on third persons, whether they be of misfeasance or nonfeasance, or to give a sound reason, why a person, who, while acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty, because he was acting as servant or agent. The tort is none the less a tort to a third person, whether suffered from one acting as principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the injury. We think the better rule declared in *Baird v. Shipman*, 132 Ill. 16 (22 Amer. St. Rep.

504), in which it is held, that "an agent of the owner of property, who has the complete control and management of the premises, and who is bound to keep them in repair, is liable to third persons for injuries resulting to the latter, while using the premises in an ordinary and appropriate manner, through the neglect of such agent. And the agent cannot excuse himself on the plea that his principal is liable. It is not his contract that exposes him to liability to third persons, but his common law obligation to so use that which he controls as not to injure another." See notes to this case in 22 Amer. St. Rep. 504, *supra*. In *Ellis v. McNaughton*, 76 Mich. 237 (15 Am. St. Rep. 308), we find this language: "Misfeasance may involve the omission to do something which ought to be done; as when an agent, engaged in the performance of his undertaking omits to do something which it is his duty to do under the circumstances; as that when he does not exercise that degree of care which due regard for the rights of others requires." In *Campbell v. Portland Sugar Co.*, 62 Me. 552 (16 Amer. Rep. 503), it is said: "It is the actual personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation, and when their acts or neglects result in injury to third persons, they are equally responsible with their principal." This rule is broadly stated in 14 Amer. & Eng. Encyc. Law, 814. We might cite other decisions if deemed necessary. We hold, that the more relation of agency does not exempt a person from liability for any injury to third persons resulting from his neglect of duty, for which he would otherwise be liable.

* * * * *

WHALEN v. PENNSYLVANIA RAILROAD COMPANY.

Supreme Court of New Jersey. 1906.

73 New Jersey Law, 192.

GUMMERE, C. J.: The plaintiff in this action sued the defendant company and one Spencer, an employee of the company, who was a citizen of New Jersey, for injuries re-

ceived by him while a passenger upon one of the defendant company's ferryboats. Plaintiff had a verdict and judgment against both defendants.

* * * * *

* * * The averment of the declaration was that "the said defendants failed and neglected to use due and reasonable care to carry the plaintiff safely in the said boat under their direction, operation and management, and so negligently and carelessly operated, managed and controlled said boat that said boat was, through negligent and careless conduct of the said Pennsylvania Railroad Company and the said Spencer, its servants, employee and agents, propelled at a high rate of speed against a certain pier or bulkhead, so that said plaintiff, while being carried as a passenger as aforesaid on the said boat of the said defendant company, under the direction and control of the said Spencer, was violently thrown to the deck of said boat, and then and there greatly injured." The negligence alleged is charged to be that of the *defendants*, and the statement that the boat, at the time of the accident, was under the direction of Spencer, does not negative this allegation.

* * * So far as this court is concerned, the rule is settled that where an injury is caused by the negligence of an agent, acting in the line of his employment, the action may be joint against such agent and his principal, or may be separate against either (*Brokaw v. North Jersey Railroad Co.*, 3 Vroom, 328, 333; *Newman v. Fowler*, 8 *id.* 89, 90), and this rule has, inferentially, received the approval of the court of errors and appeals in the case of *Peterson v. Middlesex and Somerset Traction Co. et al.*, 42 *id.* 296.

The second assignment of error, which is that a joint action cannot be maintained against an employer and employee under the circumstances set out in the declaration, is disposed of by what has already been said.

* * * * *

The judgment under review must be affirmed.

CAVENDER v. THE HEIRS OF SMITH.

*Supreme Court of Iowa. 1857.**5 Iowa, 157.*

WRIGHT, C. J.: * * *

At common law, infants were required to sue and defend by guardian. By the statute of Westm., 1 C. 48 and 2 C. 15, they were authorized to sue by *prochein ami*. These statutes, however, gave only an accumulative remedy; for the infant might still sue, either by guardian or by next friend. Co. Lit. 135, b. note, 220; *Miles v. Boyden*, 3 Pick. 213; 3 Bacon's Ab. 616. The Code simply recognizes this common law rule, and provides the same cumulative remedy—it being therein declared that minors may sue and defend by guardian; that those who have no guardian, may sue by next friend; and that the court may appoint a guardian *ad litem*, to defend for a minor, who has no other guardian. Sections 1688, 1689. In this case, the record shows affirmatively that, at the time of the death of the father, five of the defendants (his children and heirs) were minors. They were admitted to be minors by plaintiff at the May term, 1851, when he moved that they be notified of the pendency of said cause. They were never notified; they never appeared by guardian; nor was there even a next friend appointed to defend for them. To say that such minors should be concluded by a trial, thus conducted, we think, would be to establish a rule dangerous in the extreme—a rule which would be at variance with all of our settled notions of law, as applied to the rights of infant parties in a legal proceeding.

We do not believe that any case can be found, where the property of infants has been disposed of under the circumstances herein disclosed. The infant is supposed to be incapable of guarding his own interests, and it is the duty of the court, before it divests him of his estate, to be satisfied that he has had a full opportunity to have his day in court, by a proper and suitable guardian; and to see, notwithstanding any admission of facts, even by such guardian, that his rights are not sacrificed. *Walton v. Coulson*, 1

McLean, 120; *Greenup v. Bacon*, 1 Mon. 108; *Austin v. Charlestown Female Seminary*, 8 Met. 196; *Bloom v. Burdick*, 1 Hill, 131; *The Bank of United States v. Richie*, 8 Peters, 128. The minor may be sued in his own name, but he cannot appear by attorney but only by guardian, admitted, or appointed by the court. *Clarke v. Gilmanton*, 12 N. H. 515; *Alderman v. Tinell*, 8 Johns. 418; *Valentine v. Cooley*, 1 Meigs. 613; *Knapp v. Crosby*, 1 Mass. 479; *Bank v. Richie*, 8 Peters, 128; *Mercer v. Watson*, 1 Watts, 330; *Comstock v. Carr*, 6 Wend. 526; *Starbird v. Moore*, 21 Vermont, 530; 3 Bacon's Ab. 616; *Mackey v. Gray*, 2 Johns, 192.

It is claimed by counsel, however, that there is nothing to show that said five defendants were minors at the time of the trial; that they may have attained their majority before that time. In the first place it may be answered to this that the material inquiry is what was their age at the time they *appeared* and *plead* (if there was such appearance), and not at the time of the rendition of the judgment. And if it is claimed that a party, by appearance and defending a cause, after attaining his full age, thereby *waives* any error resulting from appearing and pleading in the first instance by attorney, the answer in this case is that the record does not show that these defendants had, before trial and judgment, attained their majority. We cannot presume that they were of full age at the time of the trial. By the record they appear to be minors. We will certainly not allow this to be contradicted by a presumption. * * *

WRIGHT v. LEONARD.

Court of Common Pleas. 1861.

30 Law Journal (New Series), 365.

BYLES, J.: I am of opinion that our judgment should be for the defendant. The record shews that the female defendant, a married woman, fraudulently represented to the plaintiff that certain acceptances were the acceptances of her husband and that the plaintiff relying on those rep-

representations was thereby induced to advance money on the bills to one Salt, the drawer. The law is settled that a married woman is with her husband liable for her torts; but that, on the other hand, she is not liable on her contracts made during coverture. The law is the same as to infants. They are liable for their torts, but not, with certain exceptions, upon their contracts. There is a class of intermediate cases, partaking partly of the nature of contracts and partly of the nature of torts, in which the question arises as to which category they are here to be referred. It is not easy to lay down any general rule upon this subject; but I conceive that, at all events, misrepresentations, upon the faith of which the plaintiff has acted, and which might have been treated by him as contracts or warranties, are not binding on the *feme covert* or the infant; for if they were binding, then the protection which the law throws over married women and infants would be in great measure withdrawn. Thus, a misrepresentation by an infant that he is of full age (*Johnson v. Pye*, 1 Keb. 913), or a false statement by a married woman that she is *discover*, is no ground of action (*Cooper v. Withan*, 1 Lev. 247, and *Canan v. Farmer*, 3 Exch. Rep. 698). In America there has been a great number of decisions to the effect that an infant is not liable for fraud in cases where a contract is in substance the ground of action, or where it is contained in a contract which he is not capable of making (*Wilt v. Welsh*, 6 Watts, 9 *Brown v. Durham*, 1 Root, 273; *Wallace v. Morse*, 5 Hill 391; and *Morrill v. Aden*, 19 Vermont, 505); and it would seem that the law is the same even in cases where there may be other objections to the validity of the contract besides the disability of the infant or married woman, such, for example, as the absence of consideration, for otherwise an infant or married woman might be liable where they have received no consideration, and not liable where they have received considerations. The cases in which a married woman is liable for defamatory words are obviously distinguishable from cases in which she is sought to be made liable in an action *ex contractu* or *ex quasi contractu*. In the case of defamatory words, there is not only no contract or semblance of a contract on the part of the married woman herself, but there is no agreement or assent, express or implied, on the part of the plaintiff. This distinction is indicated somewhat obscurely in the case of

Cooper v. Withan, 1 Lev. 247. In the present case the representation on which it is sought to charge the husband and wife seems to me to be in the nature of a warranty.⁴

4. "Rule 107.—A husband and wife must be sued jointly for all torts committed by the wife either before or during coverture." Dicey on Parties, 476.

SECTION 6. CONSEQUENCES OF NONJOINDER AND MISJOINDER OF PARTIES.

(a) *In Actions on Contract.*

SNELL v. DE LAND.

Supreme Court of Illinois. 1867.

43 Illinois, 323.

BREESE, J., delivered the opinion of the court.

This was an action of assumpsit brought in the De Witt Circuit Court by James De Land, Edward De Land, Jonathan Hall, Henry Magill, Robert Magill, Samuel Magill, and William Magill, against Thomas Snell, on a contract of sale, made July 1, 1864, by them to Snell, of thirteen thousand pounds of wool, at eighty cents per pound, to be delivered in a reasonable time, with an averment, that the plaintiffs did sell and deliver to the defendant in pursuance of the contract, on the 1st day of August, 1864, thirteen thousand nine hundred and forty-nine and one-half pounds of wool.

The plea was non assumpsit. * * *

* * * * *

The errors assigned are in finding the issues for the plaintiffs and in overruling the motion for a new trial.

On this assignment of error, the first point made by appellant is, that the proof does not show a joint interest in the plaintiffs in this contract.

The rule on this subject is well settled. If plaintiffs sue as joint contractors, they must show a joint interest in the contract. The appellees' counsel admit this to be the common law principle, but insist that section 7 of the act en-

titled "Evidence and Depositions" (Scates' Comp. 256, ch. 40), has changed the common law in this respect; that the names and number of the contractors are presumed to be right in the absence of any plea in abatement, or, unless the defendant proves on the trial, that the plaintiffs are too many or too few, or that their names are different.

That section was not designed to change the rules of pleading, but simply dispenses with certain proofs, plaintiffs suing as partners, or as joint obligees or payees, were required to make, at common law, under the general issue pleaded. It is a rule as old as the science of pleading itself, that in declaring in actions on contracts there must not be too few or too many plaintiffs. If there be, it is fatal to a recovery; the action must fail, and this objection can be availed of, either by plea in abatement, or as a ground of nonsuit on the trial upon the plea of the general issue. 1 Ch. Pl. 8; *Murphy v. Orr*, 32 Ill. 489. It is most proper upon the plea of the general issue, for under that plea the plaintiff is bound to prove his case as he has stated it in his declaration. The allegations and proofs must correspond—alleging that four persons, plaintiffs, made the contract declared on, with the defendant, is not supported by proof that but three of them made it, or that the four named made it, together with another person named. The rule is, that the nonjoinder or misjoinder of plaintiffs may be taken advantage of under the general issue. 1 Ch. Pl. 20.

Section 7 of chapter 40 furnishes a rule of evidence, or rather dispenses with proof of certain facts, which previous to the statute was required. It furnishes no rules of pleading, leaving them as at the common law; this is apparent from the proviso to the section. A defendant may show, as at common law, that too many persons, or too few, are joined as plaintiffs, and this under the general issue. Here there are too many plaintiffs. They are named as James De Land, Edward De Land and Jonathan R. Hall, and the four Magills. Hall, the witness, testifies that James De Land, Edward De Land, and Jonathan R. Hall were partners, and that the four Magills were partners, as a distinct partnership, as we understand it—not that the De Lands, Hall and the Magills were partners *inter sese*. * * *

* * * * *

* * * The judgment of the circuit court is reversed and the cause remanded.

*Judgment reversed.*⁵

5. The objections of nonjoinder and misjoinder of parties plaintiff may also be raised by demurrer, or by motion in arrest of judgment after verdict, or by writ of error after judgment. See many cases cited in Ames' Cases on Pleading (2nd Ed.) 133-140.

INHABITANTS OF RICHMOND v. TOOTHAKER.

Supreme Judicial Court of Maine. 1879.

69 Maine, 451.

VIRGIN, J.: Debt against the sureties on a town collector's bond, executed jointly, by Samuel Brown as principal, and these defendants as sureties.

The plaintiff's set out a joint, and not a joint and several, bond averring, with proper allegations of time and venue, that the defendants, "together with one Samuel Brown," by a certain writing obligatory, made, sealed and delivered to the plaintiffs "as the deed of the said Hagar, Toothaker and Brown, and here in court to be produced, acknowledged themselves to be bound to the plaintiffs in the sum of \$24,000, to be paid to them on demand."

The defendants pleaded *non est factum*, with brief statement of *omnia performaverunt*.

The case comes up on report, stipulating, among other things, that this court, with jury powers as to the facts, "are to render judgment, upon so much of the evidence as is legally admissible, according to the legal rights of the parties." By this stipulation the pleadings must be considered.

The defendants contended at the argument that the action is not maintainable, for the reason that the bond is joint and only two of the three obligors are made defendants.

The plaintiffs replied that the nonjoinder should have been pleaded in abatement, and that the bankruptcy of Brown excused the nonjoinder.

To these positions the defendants rejoined: (1) That the plaintiffs having in their declaration informed the court

that Brown was a joint obligor, the defendants were thereby relieved of the necessity of pleading that fact in abatement; and (2) that the debt, created by Brown's defalcation, was fiduciary, and therefore not barred by his discharge in bankruptcy.

The rule of the common law has long been well settled that all of the joint obligors or promissors (with certain well-known exceptions not essential to the decision of this case) ought to be made defendants; and that the plaintiff may be compelled to join them, if advantage be seasonably taken of any omission by proper plea. 1 Wm. Saund. 291, b. n. 4; *West v. Furbish*, 67 Maine, 17. And the general rule is that objection to the nonjoinder of a defendant can be taken only by plea in abatement. *White v. Cushing*, 30 Maine, 267; *Reed v. Wilson*, 39 Maine, 585; *Richmond v. Brown*, 67 Maine, 373.

But while there can be no doubt that, generally, in case of the nonjoinder of defendants unlike that of plaintiffs, it is essential for the party defendant to plead it in abatement, and therein give the plaintiff a better writ by giving the name of whomsoever else ought to be joined; it would seem to be equally well settled that when the plaintiff knows all who ought to be joined, and mentions them in his declaration, then there is no necessity for giving such information by way of plea in abatement; but that, in such case, the nonjoinder is a good ground of demurrer, or motion in arrest of judgment; and in case of judgment, by default at least, it may be assigned for error. *Harwood v. Roberts*, 5 Maine, 381. Gould Plead, c. 5, sec. 115; 1 Chit. Plead. (16 Am. Ed.) 54, note K.

That the objection cannot be taken at the trial, as a ground of nonsuit on the general issue, was decided by *Whelpdale's case*, 5 Co., 119, and by *South v. Tanner*, 2 Taut. 254, in which the nonjoinder appeared on the face of the declaration, but a nonsuit was set aside and a new trial granted. *Neally v. Moulton*, 12 N. H. 483. And we do not perceive any reason why it should. There is no variance, as it was formerly understood. The obligation is in law regarded as the deed of the defendants, although not their deed alone. It is none the less the defendants' obligation because another was bound with them. *Hapgood v. Watson*, 65 Maine, 510; *Gove v. Lawrence*, 24 N. H. 128. "It would be very odd," said MANSFIELD, C. J., "if proof that

a bond was executed by three would disapprove that it was executed by two of them." *South v. Tanner, supra.*

The nonjoinder might have been pleaded in abatement, notwithstanding it appeared in the declaration. *Harwood v. Roberts, supra; Neally v. Moulton, supra.* That is the means which enables one obligor to compel a joinder of all. Such a joinder may not be necessarily for the benefit of the plaintiff, but of defendant. For, when all are joined, and judgment is rendered against all, any one of them may, by paying it, have contribution against the others; and the judgment will afford him conclusive evidence of the amount to be paid by them. If, then, a defendant omits to compel a joinder by pleading a nonjoinder, he simply waives an advantage which he might have obtained. He would not thereby lose his right of contribution, to be sure, but he would have no judgment which would conclude his contributors.

* * * * *

Our conclusion, therefore, is that the plaintiffs are entitled to judgment.

BURGESS v. ABBOTT.

Court for the Correction of Errors of New York. 1843.

6 Hill, 135.

WALWORTH, Chancellor: The plaintiff in error in this case was sued in an action of debt upon a judgment which is stated in the declaration to have been recovered against him and H. Crane, in an action of assumpsit, in the superior court of Cincinnati, Ohio. And it does not appear by the declaration whether Crane was alive or dead at the time of the commencement of this suit upon the judgment. The question for consideration, therefore, is, whether the declaration is so defective in substance as to make it the duty of the court to give judgment for the defendant upon a general demurrer to the declaration.

It was decided, in the case of *Horner v. Moor*, in the court of king's bench in England, in 1750 (see 5 Burr. Rep. 2614), where it appeared, on the face of the declaration, not only that the bond upon which the defendant was sued was made

by him jointly with another person, but also that such other person was still living, that the neglect to join such person in the suit was a good ground for arresting the judgment. And if it could be objected to in that way, the declaration must necessarily be bad upon a general demurrer. Sergeant Williams note to the case of *Cabell v. Vaughan* (1 Saund. Rep. 291, n. 4) is to the same effect; and it may fairly be inferred from this note also, that, in his opinion, if both of those facts did not appear from the declaration, or some other pleading on the part of the plaintiff, the defendant could not raise the objection of the nonjoinder of a joint obligor in any other way than by a plea in abatement. In such a plea it is well settled that the defendant must not only show that the contract upon which he is sued was jointly made by him and another person, but also that such other person is still living. (*Hollingworth v. Ascue*, Cro. Eliz., 355, 494.)

I have not been able to find any English case in which it has been decided that advantage could be taken of the nonjoinder of a co-obligor or promisor, upon general demurrer to the declaration, in an action upon the contract, even where it appeared by the plaintiff's own showing that there was originally a joint contract; unless it also appeared that the joint contractor was still living. On the other hand, I have not found any actual decision in England that the objection could not be made by special demurrer, where the fact appeared upon the face of the declaration that the contract was made jointly with another unless the plaintiff went further and showed some excuse for not making such joint contractor a party of the suit; as by showing that he was dead, or was an infant, and therefore not legally liable upon the joint contract. The cases relied on by Mr. Justice STORY in *Gilman v. Rives* (10 Peters' Rep. 299), to prove that a declaration is bad upon general demurrer, if the plaintiff shows there were other persons who contracted jointly with the defendant, will be found upon examination not to have been ordinary actions to recover a debt, or damages arising upon contract; but they were proceedings by *scire facias* upon records, to obtain execution thereon. (See *Blackwell v. Ashton*, Aleyn's Rep. 21, *Style's Rep.* 50, S. C.; *The King v. Young*, 2 Anst. Rep. 448; *The King v. Chapman*, 3 id. 811.) Those cases rest upon the technical ground that the writ of *scire facias*, upon a judgment or recogni-

zance, to obtain execution thereon, must conform to the record, unless there is some suggestion in the writ showing a good reason for departing from it. * * *

* * * * *

There is no good reason why the defendant in such a case should be permitted to raise a formal objection of this kind by general demurrer, since the statute requiring matters of form to be specially pointed out. Where it appears by the plaintiff's own showing that there is a joint contractor still alive, who has not been made a defendant in the suit, it is evident that he ought not to be permitted to proceed in such suit without making him a party. But where it does not appear that the joint contractor who is not sued is in full life, but a mere inference of law arises that he may be, the defendant, if he can raise the objection by demurrer, should demur specially. For if the attention of the plaintiff was called to the fact by a special demurrer that it did not appear by his declaration but that such joint debtor was in full life and might have been joined in the suit, he might amend his declaration, where the fact would justify it, and cure the apparent irregularity by showing that the joint contractor was dead, or had been discharged under the bankrupt act, or that he was an infant and therefore would not be legally bound by the contract if he chose to make that objection. And either of these would be a good answer to the apparent informality appearing in the original declaration. The legislature having prohibited the defendant from delaying the suit by a plea in abatement where the declaration does not show a joint indebtedness, unless he shows the joint contractor is in full life as well as the joint liability, by swearing to his plea, the plaintiff ought not to be turned out of court, by a general demurrer, upon the mere presumption that such party may be still alive and subject to a suit upon the joint contract. For these reasons, although I am inclined to think, in the absence of any direct authority to the contrary in England, before the revolution, or in this State since, that the objection to the declaration in the present case might have been valid if specially pointed out by the demurrer, I am satisfied it is not an objection of which the defendant can avail himself, in this State, either by general demurrer to the declaration, or by a motion in arrest of judgment.

I am aware that, in the case of *Gilman v. Rives*, before referred to, and in the cases cited by the court below from the reports of Virginia and of Maine (*Leftwich v. Berkeley*, 1 Hen. & Munf. 61, *Harwood v. Roberts*, 5 Greenl. Rep. 441), the objection has been held good upon general demurrer, motion in arrest of judgment, and even upon a writ of error after a judgment entered by default against the defendant. But the decisions in all of those cases appear to be based upon the English decisions in the three *scire facias* cases from Aleyn, Style, and Anstruther; without adverting to the distinction between proceedings of that kind and ordinary actions. And it has been decided by the courts of other States that the defendant cannot avail himself of the objection of nonjoinder in any form of pleading unless it appears that the joint contractor who is not sued is in full life, as well as jointly liable with such defendant. (See *Mackall v. Roberts*, 3 Monr. (Kent.) Rep. 130; *Geddes v. Hawk*, 10 Serg. & Rawle (Penn.) Rep. 38.)

I therefore think the decision of the superior court of the city of New York in this case was not erroneous; and that the judgment of the supreme court sustaining that decision should be affirmed.

• • • • •

Judgment affirmed.

SNELLGROVE v. HUNT.

Court of King's Bench. 1819.

1 Chitty's Reports, 71.

Assumpsit on a bill of exchange drawn the 16th of January 1818, payable four months after date for £100 to the order of Bartholomew White, the bankrupt, and accepted by the defendant. The declaration alleged the promises to be made to the assignees of the bankrupt. At the trial before ABBOTT, C. J., at the sittings after last term at Guildhall, it appeared in evidence that the commission issued against the bankrupt was dated on the 7th of March, 1818; that the bill of exchange in question was due on the 19th of May following; that there were three

assignees appointed under the commission, two only of which joined in the present action. Under these circumstances, it was objected on the part of the defendant, that all the assignees should have joined in the action, inasmuch as the action was founded entirely upon promises to all. The case of *Bloxam v. Hubbard*, 5 East, 405, was cited as an express authority; and the chief justice acquiescing in the objection, the plaintiffs were nonsuited.

F. Pollock now moved for a rule to shew cause why the nonsuit should not be set aside, and a new trial granted. The question in this case is, whether two assignees out of three may not lawfully sue, inasmuch as they sue in a representative character. Undoubtedly it must be admitted that the declaration in this case is founded entirely upon promises made to the assignees of the bankrupt generally. But this case may not be considered as distinguishable from the case of executors, who may sue without joining all the executors named in the will. This objection however, it must be confessed, had some strong authorities in support of it, and after looking more accurately at the pleadings, it is to be feared that the declaration cannot be supported. It cannot be doubted that there is a distinction between *tort* and *assumpsit*. In the former species of action it is competent for one of several persons jointly interested to bring the action, and the defendant can only take advantage of the objection by a plea in abatement, but in the latter he may avail himself of it on non assumpsit. In the case of *Bloxam v. Hubbard*, 5 East, 407, which was an action of trover, in which only three out of four assignees joined, and a similar objection being taken, Lord ELLENBOROUGH, C. J., said, "Assuming it to be well founded, and we think it so, it has only the effect of precluding the plaintiffs, who are three out of the four assignees, in whom the property of the ship originally was vested, from recovering more than their three-fourth parts in value of the property in question. For, it is now too well settled to be any longer disputed in a court of law, that the defendant can only avail himself of an objection of this sort, viz., that all the several part owners in a chattel have not joined in an action of trespass or of tort brought in respect to it by plea in abatement." Upon the same principle this case does not come within the ordinary rule which applies where executors declare without being all

joined in the action. The chief justice at the trial certainly asked whether the averment in this declaration could be established by the evidence upon any decided authority. Expecting that it might be brought to correspond with the principle of the case of executors, it was contended on that occasion, that the objection taken to the declaration was not available; but upon consideration it must be acknowledged that it does not fall within that principle, because the implied promises would be to all the assignees, whereas the promises averred in the declaration are only to two of them. Probably, however, the court would think that what is said in a note of Serjeant *Williams*, in his edition of *Saunders's Reports*, 1 Saund. Rep., 4th Ed. 291, g. note 2, is not inapplicable to the present case. What he says is this: "With respect to contracts not under seal, where in writing or by parol, a distinction has been taken between *actions of assumpsit* and *actions of tort*; in the former case, if the one only of several persons who ought to join bring the action, the defendant may take advantage of it on *non assumpsit*, but in the latter he must plead it in *abatement*. And this distinction is universally adopted. However, it may not be improper to observe as to *assumpsit* by one only, that at the time when most of the cases upon this subject were decided, the same rule extended as well to *defendants* as to *plaintiffs*. The rule in both cases was founded upon the same reason that the contract proved was not the same with that in the declaration. But as soon as it was decided in the case or *Rice v. Shute*, 5 Barr. 2611, 2 Bl. R. 947, and the other cases which followed it, that leaving out one of the joint contractors did not vary the contract, one would have thought that the same principle would be applied to the case of persons with whom the contract was made. If the contract be still the same, notwithstanding one of the persons who ought to be made codefendant is omitted, upon what principle is it that the contract is not the same, if one of the persons who ought to be co-plaintiff be omitted? Perhaps it may be objected, that by this means the plaintiff and the defendant are not upon equal terms; that in an action against one only, he necessarily knows all the persons liable; but in an action by one only, the defendant may often not know nor be able to know, what persons ought to join. But in answer to

this, it should always be remembered that the rule is founded upon the supposed variance between the contract proved and the contract laid, and not upon any inconvenience or convenience to the parties. As to the knowing of the persons, the cases above referred to, respecting *defendants*, have decided that this circumstance is immaterial; and as to the convenience or inconvenience of the thing, it should seem more convenient that the parties should, after issue joined, proceed upon the merits, than that the defendant should be allowed to nonsuit the plaintiff upon a mere matter of form. However the settled distinction is, as I have before mentioned, *and it must be left to the operation of time, and the same good sense as at last prevailed in Rice v. Shute, respecting defendants, to do away a distinction which seems to me to have no principle for its foundation.*" It is to be feared that that period has not yet arrived, and it is probable that this learned person did not know how much he had to contend with.

ABBOTT, C. J.: I have a great respect for that learned writer, and no man entertains more respect for his opinions than I do, but I think that there is very great reason for the distinction which he seems to contend against. The plaintiff knows or ought to know who are his own partners in a transaction, but he may not be able to ascertain how many persons are liable to be sued jointly; consequently, the omission of a party who ought to have been a coplaintiff is a ground of nonsuit; but the omission to make a party a defendant can only be taken advantage of by plea in abatement. I think this declaration is clearly bad.

* * * * *

ELIOT v. MORGAN.

Court of King's Bench (?). 1836.

7 Carrington and Payne, 334.

Assumpsit for work and labor as a surveyor.

Plea by the defendant William Morgan—payment of 281*l.* before the action, payment into court of 500*l.* more, and that the plaintiff had not sustained damage to a greater amount.

Plea by the defendants C. Morgan and H. J. Morgan—*first, non assumpserunt modo et forma*; and, *second*, that the plaintiff's claim was on a *quantum meruit*, and that he had done the work so badly that the defendants had derived no benefit from his services.

COLERIDGE, J.: Although the defendant William Morgan had admitted the joint contract on the record, yet, if the other defendants succeed in shewing that they are not jointly liable, the plaintiff must fail as to all; for a joint contract must be established against all, or against none; and it is competent for the two defendants, under their plea of the general issue, to avail themselves of the defence that too many defendants had been joined in the action.

Verdict for the plaintiff.

(b) *In Actions in Tort.*

PHILLIPS v. CUMMINGS.

Supreme Judicial Court of Massachusetts. 1853.

11 Cushing, 469.

This was an action of tort, averring that the defendant forcibly entered the premises of the plaintiff and took possession of the plaintiff's house and land, and converted the same to her own use. At the trial in the court of common pleas, before BISHOP, J., it appeared that the plaintiff derived title through several *mesne* conveyances, from the levy of an execution upon the premises in favor of Edwin Spencer and Ephraim S. Jackson. Jackson conveyed by quitclaim all his right and interest in the premises, and the plaintiff claims through that title. There was no evidence of a conveyance from Spencer of his interest in the premises. The defendant objected that the plaintiff could not maintain this action, because his cotenant Spencer was not joined, and asked the court so to instruct the jury. But the judge declined so to do, and the verdict being for the plaintiff, the defendant excepted.

BIGELOW, J.: The rule is fully and clearly established that in actions of tort, such as *quare clausum*, or trover for

taking goods, case for malfeasance, misfeasance, or nonfeasance, and the like, if the one only of two or more joint tenants, tenants in common, executors, assignees, and others who ought regularly to join, bring any such actions, the defendant must plead the nonjoinder in abatement, and cannot rely upon it to defeat the action under the general issue, or avail himself of it for that purpose by plea in bar, arrest of judgment, or otherwise. 1 Saund. 291 *h*; 1 Chit Pl. 66; *Bloxam v. Hubbard*, 5 East, 407, 420.

Exceptions overruled.

GERRY v. GERRY.

Supreme Judicial Court of Massachusetts. 1858.

11 Gray, 381.

Action of tort for the conversion of a watch and chain. At the trial in the court of common pleas, it appeared that the watch and chain had been purchased in 1853 by the female plaintiff during coverture, with money earned by her. The defendant objected that upon this evidence the action should have been brought in the name of the husband only; but SANGER, J., for the purposes of the trial, overruled the objection; a verdict was returned for the plaintiffs, and the defendant alleged exceptions.

METCALF, J.: This case is not affected by either of the recent statutes of the commonwealth concerning married women, but is to be decided by the rules of the common law. By that law, the watch and chain, which are the subjects of this suit, were the sole property of the husband. No authority need be cited to this point. It follows that the wife has wrongly joined as plaintiff. And the misjoinder of the plaintiffs is fatal, both in actions of tort and in actions of contract. When the misjoinder appears on the declaration, it is fatal on demurrer; and before our practice act (Par. 22) took effect, it would have been fatal on motion in arrest of judgment. When it appears only in evidence at the trial, it is ground of nonsuit, or requires a verdict for the defendant. Archb. Pl. 54; Browne on Actions, 307; *Glover v. Hunnewell*, 6 Pick. 224; *Ulmer v. Cun-*

ningham, 2 Greenl. 117. These rules of law are applied as well to husbands and wives as to other misjoined plaintiffs. Archb. Pl. 39; Broom on Parties, 229, 230. *Moore v. Carter*, Hempst. 64; *Van Arsdale v. Dixon*, Hill & Denio, 358; *Rawlins v. Rounds*, 27 Vern. 17.

In actions of tort, there is a distinction between nonjoinder and misjoinder of plaintiffs. Nonjoinder is matter of abatement only. *Thompson v. Hoskins*, 11 Mass. 419; *Phillips v. Cummings*, 11 Cush. 469.

The verdict must be set aside, and a new trial granted. But a new trial will be of no avail, unless the declaration is so amended as to make the husband sole plaintiff.

Exceptions sustained.

BUDDINGTON v. SHEARER.

Supreme Judicial Court of Massachusetts. 1839.

22 Pickering, 427.

SHAW, C. J., drew up the opinion of the court.

This action was commenced against James Shearer and Lewis Shearer, jointly, to recover double damages under the statute, for injuries alleged to have been sustained from a dog owned and kept by them. The statute provision is, that every owner and keeper of any dog, shall forfeit and pay to any person injured by such dog, double the amount of damage sustained by him, to be recovered in an action of trespass. Revised Stat., c. 58, sec. 13.

* * * * *

It now appears that before the last trial, James Shearer had deceased, and the action proceeded against Lewis. On the trial, the admissions of James were offered in evidence, made during his life, to prove that the dog belonged to himself and Lewis, there being other evidence to prove the ownership of Lewis. This was objected to, but admitted; and upon that objection the defendant now moved for a new trial.

* * * * *

But we do not think it necessary to pursue the subject, or to consider this objection more particularly, because the

court are of opinion, that upon this last trial, after the death of James, it was not necessary to prove that he was part owner of the dog, which was the only object of the testimony, and therefore the evidence objected to was immaterial.

It is a familiar rule of law, that in cases of tort, where two or more are liable to an action, they are liable jointly and severally; and therefore if one is sued alone, it is no ground of abatement that others, who are liable, are not sued. And if two or more are sued, a verdict may be rendered against one and in favor of others; and on such a verdict, judgment may be rendered against the one. Of course, therefore, although a joint liability is averred, it need not be proved.

From the application of this rule, it will be obvious that, had the cause proceeded to trial against both, on a declaration, charging them in different counts as owners, and as keepers, in order to charge Lewis, it would not have been necessary to prove James to be an owner. Then *a fortiori*, when by the death of James the suit abated as against him and properly proceeded against Lewis alone, it was to be regarded in the same manner as if Lewis alone had been sued; and the ownership of James became wholly immaterial.

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Judgment on the verdict for the plaintiff.

PEARSON v. STROMAN.

Constitutional Court of South Carolina. 1818.

1 Nott and McCord, 354.

COLCOCK, J.: This action was originally brought against two defendants. At the spring court of 1811, a motion was made by plaintiff's counsel for leaving to strike out the name of one of the defendants, and to proceed against the other, which was granted.

After the plaintiff had gone through his evidence to prove a title in himself, a motion was made for a nonsuit, on the

authority of the case of *Steel v. Ward et al.*, decided in the constitutional court, at Columbia, April, 1813, which (it was then argued, and as I then thought correctly) had determined, that where an action was brought against two or more for a joint trespass, that the plaintiff should not be permitted, after taking issue, to strike out one defendant, and proceed against the other. And the case, from the manuscript report, does appear to be such an one, for in that a motion was made to strike out all but one defendant, and refused; the plaintiff suffered a nonsuit, with leave to move to set it aside, which he did, and his motion was refused.

It is clear, upon the general rules of pleading, that the plaintiff had a right to enter up a *nolle prosequi* as to one defendant (1 Chitty, 546, *Greeves v. Rolls*, 2 Salk. 456; Tidd's Practice, 4th Edit. 622, 2 Amer. Ed. 632) in actions *ex delicto*; for in such one might be found guilty and the other acquitted. 1 Sellon's Prac. 336; 1 Chitty, 31; 2 Loft's Gilb. 595; 1 Morgan's Ess. 394; *Brown v. Haselrig et al.*, 2 Vent. 151.

The nonsuit must, therefore, be set aside, and a new trial granted.

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